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Nos. 269 and 270

In the Supreme Court of the United States

OCTOBER TERM, 1938

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., KARL HOBLITZELLE, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., VITAGRAPH, INC., RKO-RADIO PICTURES, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas (R. 229) [1] is

[1] The record now before the Court is in two parts. The first part is the record which was before the Court upon the former appeal in this cause (Nos. 709 and 710, October Term, 1937). The second part consists of the proceedings in the cause subsequent to the first appeal. References to the first part of the record will not be italicized, and references to the second part will be italicized, i. e., R. 68, *R. 68.*

reported in 20 F. Supp. 868. The opinion of this Court upon the former appeal in this cause was reported in 304 U. S. 55.

JURISDICTION

The decree of the District Court was entered on June 9, 1938 (*R. 77*). The petitions for appeal were filed on July 6, 1938, and were allowed the same day (*R. 79, 82, 97, 100*).

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., title 15, sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 931, 936 (U. S. C., title 28, sec. 345).

QUESTIONS PRESENTED

1. Whether the evidence supports the District Court's finding that the defendants conspired with Interstate Circuit, Inc. (referred to herein as Interstate) to impose an admission-price and a double-billing restriction on subsequent-run exhibitors.

2. Whether the restrictions which were imposed effected an undue and unreasonable restraint of interstate commerce (a) if they were, as the Government contends, the product of a joint conspiracy among the distributor defendants and Interstate and (b) if they were, as appellants contend, merely the product of a series of wholly independent agreements between Interstate and the several distributor defendants.

3. Whether the restraints imposed by the restrictions are so far within privileges and immunities conferred upon the distributor defendants by the copyright law that these restraints are removed from the prohibitions of the Sherman Act. In other words, is Interstate, which owns no copyrighted pictures but only operates a chain of theatres, permitted under the copyright law to induce the distributor defendants owning a majority of picture copyrights to enter into agreements with it for the avowed purpose of effectuating a plan to impose unreasonable restraints on competing theatres?

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, secs. 1, 2, and 4), known as the Sherman Act, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

Prior proceedings in the cause

This is a proceeding in equity brought by the United States under the Sherman Act to enjoin appellants from combining and conspiring to restrain interstate commerce in motion-picture films. At the trial, certain facts were stipulated and oral and documentary evidence bearing upon the issues was introduced by both parties. At the conclusion

of the trial the District Court rendered an opinion holding that the evidence established a combination in illegal restraint of interstate commerce, and entered a decree granting the United States injunctive relief. On appeal from such decree, this Court, without passing upon the merits of the questions raised by the appeal, set aside the decree and remanded the cause to the District Court because of its failure to state its findings of fact and conclusions of law as required by Equity Rule 70½. *Interstate Circuit, Inc.*, v. *United States*, 304 U. S. 55.

Following this remand the District Court made separate findings of fact and stated its conclusions of law (*R. 50–62*). It also entered a decree enjoining appellants from continuing any combination, conspiracy, or agreement such as the Court had found to exist and to be illegal, and from entering into or becoming a party to any similar combination, conspiracy, or agreement (*R. 76–79*).

The parties defendant and the nature of their business operations

The proceeding in this case was instituted against two groups of defendants, those in one group being designated as the distributor defendants and those in the other as the exhibitor defendants. The distributor defendants are the appellants in No. 270 and the exhibitor defendants are the appellants in No. 269.

The distributor defendants are eight corporations [2] engaged in distributing motion-picture films in interstate commerce throughout the United States and the Texas agents of two of these distributors. They distribute about 75% of all first-class feature [3] pictures which are distributed for exhibition in the United States (A. S.,[4] par. 2, R. 50).

Appellants admit (Br., p. 68) that the distributor defendants, in making contracts for the exhibition of their films in Texas and in carrying out these contracts, are engaged in interstate commerce. See *Binderup* v. *Pathe Exchange*, 263 U. S. 291. The distributor defendants solicit from exhibitors located in Texas applications for licenses to exhibit films; forward applications received from such exhibitors to their respective New York offices, where they are acted upon; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered

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[2] The names of these corporations and the abbreviated titles by which they will be referred to herein are:

Name	*Abbreviated title*
Columbia Pictures Corporation	Columbia
Twentieth Century-Fox Film Corporation	Fox
Metro-Goldwyn-Mayer Distributing Corporation	Metro
Paramount Pictures Distributing Company, Inc	Paramount
RKO Radio Pictures, Inc	RKO
United Artists Corporation	United Artists
Universal Film Exchanges, Inc	Universal
Vitagraph, Inc	Vitagraph

[3] A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

[4] The letters "A. S." will be used to designate references to the Agreed Statement of Facts.

and redelivered to local exhibitors in fulfillment of exhibition contracts; and after all such contracts have been fulfilled, finally reship the films to laboratories maintained outside of Texas (Fg. 10, *R. 52*).

The exhibitor defendants are Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (referred to herein as Texas Consolidated), Karl Hoblitzelle and R. J. O'Donnell. Hoblitzelle is the president and O'Donnell the general manager of both Interstate and Texas Consolidated, and they are in active charge of the business and operations of these corporations (Fg. 9, *R. 52*). Interstate and Texas Consolidated are affiliated with each other and with Paramount, one of the distributor defendants (*ib.*).

The 43 motion-picture theatres which Interstate operates are located in Austin, Dallas, Fort Worth, Galveston, Houston, and San Antonio. It has a complete monopoly of the first-run theatres in these cities, except for one in Houston operated by an affiliate of Metro, and the admission price[5] at all but a few of its first-run theatres is 40¢ or more (Fg. 7, *R. 51*). It also operates several subsequent-run theatres in each of these cities, but in all of them, except Galveston, there are other subsequent-run theatres which are competitive with In-

[5] As used in this brief the words "admission price" will mean, unless otherwise indicated, a lower floor night admission price for adults. Interstate first-run theatres which charge an admission price of 40¢ or more will sometimes be referred to as "A" theatres.

terstate's first-run and subsequent-run theatres (*ib.*). A first-run theatre is one in which feature pictures are given their first exhibition in the city where the theatre is located and a subsequent-run theatre is one which shows feature pictures which have been previously exhibited in the same city.

Texas Consolidated operates 66 theatres, some of them first-run and others subsequent-run houses. Its theatres are in various cities and towns in Texas and in Albuquerque, New Mexico, but it has no theatres in the six cities in which Interstate operates (Fg. 8, *R. 51–52*).

Interstate and Texas Consolidated plainly dominate the motion-picture theatre business in the cities where their theatres are located. This is demonstrated by a comparison of the license fees which they pay the distributor defendants for pictures with the license fees paid these distributors by all other exhibitors in the same cities. For the 1934–35 season this comparison shows: Interstate payments, $1,077,819.58; payments by all other exhibitors operating theatres in the same cities, $369,594.72; Texas Consolidated payments, $594,863.68; payments by all other exhibitors operating in the same cities, $47,928.22 (A. S., pars. 5–6, R. 52–53).

The restrictions on subsequent-run exhibitors requested by Interstate and Texas Consolidated

On April 25, 1934, O'Donnell wrote an identical letter on Interstate's letterhead to the Texas branch

manager of each defendant distributor stating that Interstate, in contracting for pictures for the coming 1934–1935 season, would insist that any picture shown first run in an Interstate theatre at an admission price of 40¢ or more "must not be exhibited in the subsequent runs at less than 25¢ at any future time" (A. S., par. 10, R. 62–63). On July 11, 1934, after O'Donnell and Hoblitzelle had discussed the proposed price restriction with the president of Paramount (R. 173, 175), O'Donnell sent a second letter on Interstate's letterhead to the same branch managers reaffirming his earlier request. The letter also demanded that feature pictures shown first run in an Interstate theatre at an admission price of 40¢ or more "shall never be exhibited in conjunction with another feature picture" and that any feature picture exhibited first run in a Texas Consolidated theatre in the Rio Grande Valley should not thereafter be exhibited in the same city at an admission price of less than 25¢ (Fig. 12, *R. 53*). The letter reads (A. S., par. 11, R. 63–64):

> Messrs.: J. B. Dugger, Herbert MacIntyre, Sol Sachs, C. E. Hilgers, Leroy Bickel, J. B. Underwood, E. S. Olsmyth, Doak Roberts.
>
> GENTLEMEN: On April 25th, the writer notified you that in purchasing product for the coming season 34–35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to

purchase produce to be exhibited in its "A" theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this "A" product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on "A" pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our "A" theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Val-

ley situation. We must insist that all pictures exhibited in our "A" theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

The admission price customarily charged by independently operated subsequent-run theatres in Texas at the time these letters were sent was either 15¢ or 20¢ (R. 105). In 17 of the 18 theatres of this kind whose operations were described by witnesses, the admission price, before the restrictions which O'Donnell proposed went into effect, was less than 25¢; in one it was 25¢ (R. 109, 113, 116, 121, 123, 127, 130, 134, 138, 139, 141, 143, 144, 147). It was also the general practice of these theatres to double bill, either on certain days in the week or with any feature picture which was weak in drawing power (R. 105, 111, 127, 144, 148). Accordingly, the change in business practice which Interstate was seeking to force upon subsequent-run exhibitors was material and substantial.

Restraints of the kind demanded by Interstate were also wholly without precedent in the industry. It is true that the distributors' contracts with subsequent-run exhibitors generally provided for a

minimum admission price of 15¢,* although sometimes the minimum was 10¢ (Fg. 13, *R. 53*), but this minimum was a matter of individual arrangement between the particular distributor and exhibitor. The distributor was always free, in the exercise of its independent judgment, to omit this contract provision in individual cases or to waive performance, whereas Interstate demanded an admission price restriction which the distributor could neither omit nor waive without violating its agreement with Interstate. Not only was the proposed constraint novel in this respect, but, what was even more important, the jump in the minimum from 15¢ or 10¢ to 25¢ was so drastic that it wholly altered its character and the scope of its application. It represented an increase in price, in one single raise, of from 66% to 150%.

Likewise, in the case of double-billing, the District Court found that the restriction proposed by Interstate "constituted a novel and important de-

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*Appellants state (Br., pp. 20 21, 64) that from the beginning of its business United Artists had declined to license subsequent-run exhibition at less than 25¢ admission. We submit that this somewhat overstates what the record shows. United Artists' branch manager in Dallas testified that the company, in licensing pictures for subsequent exhibition, negotiated as part of the deal an agreement upon the exhibitor's admission price; that a 25¢ admission was the company's "general practice"; and that the company "requested" and "tried to maintain" this minimum; but the witness was unable to state definitely that "we were able to get twenty-five cents admission price from all subsequent run exhibitors here in Dallas" (R. 213-214).

parture from prior practice" (Fg. 14, *R. 54*). While four of the distributor defendants, before or about the time of O'Donnell's demands, individually adopted the policy of including in their contract forms (used generally throughout the United States) provisions restricting double billing,[1] these restrictions could be waived at any time by the copyright owner. None were subject to control by a third party.

The distributor defendants recognized the novel and far-reaching character of O'Donnell's proposals. Paramount's branch manager, who "had heard a good many exhibitors express themselves in connection with" this matter, admitted that the restrictions were considered "quite a startling proposition" (R. 199). Universal's branch manager, in forwarding O'Donnell's July letter to his home office, wrote (R. 153):

> I am sure this will give you some idea as to how tough these fellows expect to be in the Dallas territory and it looks to me like a sales policy that should be "nipped in the bud" in New York for after all, a policy of

[1] It had always been the policy of United Artists to prohibit double billing (R. 180). The contracts used by Vitagraph from the beginning of the 1933–1934 season, and the forms of contracts used by Metro and RKO in the 1934–1935 and subsequent seasons, contained provisions against double billing (Fg. 14, *R. 53*). The record does not show the dates on which Metro and RKO adopted these contract forms (*ib.*).

> this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money.

RKO's branch manager in forwarding the same letter to his home office wrote (R. 158–159):

> In view of the fact that this letter requests us to set up a definite sales policy as outlined by them, I would appreciate your advising me if under our national sales policy, we would be within our rights to agree to any such set-up even if we agreed with them. They are automatically trying to set up a model arrangement for the United States without giving us anything to say about it.

The letter from Metro's branch manager forwarding the July letter to the company's general sales manager said (R. 155):

> In my opinion Bob is making some unfair demands, imposing conditions on us of which he is a flagrant violator. This has particular reference to the fifth paragraph of his letter, as he is playing double features in Ft. Worth, San Antonio and plenty of other situations.

These statements are most significant as evidence that the change was drastic. They reflect the reaction of the managers on the spot in Texas. Some not very successful attempts were made to explain away these utterances (R. 153–154, 156–157, 159). However, the defendants declined to call the only persons who could have authoritatively explained

them away, to wit, those in actual control of company policy.[8]

Thus the reaction of even the distributor defendants was surprise and doubt, bordering on hostility. The reaction of those injured, the independent subsequent-run exhibitors whose competition it was intended to curb was, complete consternation. They saw oppression, even ruin, before them. The president of a state-wide organization of independent exhibitors in Texas, upon learning of the proposed restrictions, called a meeting of the exhibitors affected (R. 104, 106). A committee of three was appointed to visit Hoblitzelle to persuade him to modify his oppressive demand. Concerning their unsuccessful interview with Hoblitzelle, one of the committee members testified (R. 106):

> We advised Mr. Hoblitzelle that the conditions laid down would force theatres which had been charging fifteen and twenty

[8] Testimony of even greater significance than the evidence referred to in the text was first admitted by the District Court over the defendants' objection and later was excluded upon the ground that the branch managers "are merely agents and the scope of their authority could hardly cover these matters" (R. 223). The testimony was that Columbia's branch manager had stated that Columbia opposed the restrictions because its counsel thought them illegal and that it "wouldn't have come in unless the rest did." and that Fox's branch manager stated that Fox violently opposed the restrictions and that, if Columbia and RKO had stuck, "they wouldn't have come in on the restrictions" (R. 220–223). See also an offer of like proof by a third witness (R. 224–225).

cents for ten years or more to advance their prices. It would be a great burden upon them. In fact, it would drive away their customers to a great extent. And on the other horn of the dilemma we showed him the almost impossibility, or at least grave difficulty of running the theatres with the product denied.

The action taken on the restrictions requested by Interstate and Texas Consolidated

Upon receipt of O'Donnell's letters the branch managers, who were themselves without authority to act on the proposed restrictions, notified their home offices (Fg. 15, *R. 54*). Then followed during the summer a series of conferences between Hoblitzelle and O'Donnell, acting for Interstate and Texas Consolidated, and representatives of the various distributors to discuss the terms of contracts for the 1934–1935 season (Fg. 16, *R. 54*). In these conferences each distributor was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas (Fg. 15, *R. 54*). The discussions covered both the question of imposition of the restrictions on subsequent-run exhibitors and the actual terms of the contract in such important matters as the amount to be paid the distributor for its pictures, the number of its pictures to be exhibited in Class "A" theatres, and clearance or availability.[9]

[9] Clearance or availability means the interval of time which the distributor and the exhibitor agree shall elapse

In the course of these conferences, each distributor defendant agreed to impose both of the requested restrictions upon subsequent-run exhibitors (Fg. 16, *R. 54*), but, as we point out later (*infra*, pp. 36–43), the restrictions to which the distributors uniformly assented varied in important respects from those originally requested.

At this time, it is important to point out that we take issue with the accuracy of appellant's statement (Br., p. 63) that there was "uncontradicted and unimpeached" testimony "that the distributors acted independently of one another and that there was no communication or concerted action among them." As a matter of fact, there is no testimony concerning these conferences which supports that statement. O'Donnell who represented Interstate only went so far as to say that he took the matter up with one distributor at a time. The branch managers who testified, with one exception, used the personal pronoun in stating that they took independent action, the testimony being that "I" acted independently of any other distributor, or that "I" did not know what action other distributors would take, or that "I" did not have prior discussion or conferences with representatives of other distributors (R. 153, 198, 201, 213). The ex-

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between first exhibition of a picture and its second exhibition in the same city, and the terms likewise apply to like intervals of time between second and third exhibitions, third and fourth, etc. (See Appellants' brief on the prior appeal, p. 2.)

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ception was Columbia's branch manager who testified that "I and my company acted independently of any other company" (R. 217). This witness later admitted that he had no power to agree to the restrictions, that they were "approved by New York", and that "Deals of this magnitude are approved in New York" (R. 218). Indeed, this witness' lack of authority was the ground upon which the defendants themselves objected to, and the court excluded, testimony as to statements which he made concerning the restrictions (R. 223).

Neither Hoblitzelle nor O'Donnell was in a position to testify, nor did either testify, that the distributors, in agreeing to the restrictions, acted independently of one another and without agreement among themselves. The testimony of the branch managers was confined to their personal action.

The only witnesses who could have testified that the distributors acted independently of one another were the superior officials from outside of the State of Texas who represented the distributors at these conferences. None of these officials were called as witnesses.

There is therefore nothing in the record which militates against the District Court's finding that the defendants' failure to produce these officials supported the prima facie showing of concerted action resulting from the identity in the terms of the agreements with Interstate.

Some of the distributors reached an agreement more quickly than others. This circumstance is

used by appellants as a basis for inference that there was no concerted action. We set forth below the circumstances causing delay in the four cases where delay occurred,[10] and submit that they do not in any way support this inference.

Although Interstate's requests had covered feature pictures shown in any Interstate first-run theatre charging 40¢ or more for admission and although Interstate operated theatres of this kind in six cities, the eight distributor defendants, with substantial unanimity, agreed to impose and did impose the restrictions in only four of these cities, Dallas, Fort Worth, Houston, and San Antonio

[10] Fox "was handling two outstanding box office attractions" and was "asking considerably increased terms" and the negotiations, begun in July, were concluded in October (R. 178). There is nothing in the testimony to indicate that objections to the restrictions on the part of Fox delayed consummation of the deal.

At the opening of discussion with RKO, Interstate explained its theory, "and while they didn't agree or disagree on the price restriction, or double billing, our great discussion for two months was terms." They "were asking a higher scale of terms for" certain pictures and we "couldn't get together" on the terms for their product. When an agreement was reached in New York on these terms they notified their Dallas agent and the deal was completed upon O'Donnell's return to Dallas (R. 180–181).

Universal's "greatest concern was to try to increase" the number of its pictures to be exhibited in Class "A" theatres and it "took us longer with Universal because of that" (R. 179). Universal's "contention" was that it did not want to agree to the restrictions unless it could get such an increase.

Columbia's concern "was greatly the same as Universal," that is, how many of the distributor's pictures would be exhibited in "A" theatres (R. 181).

(Fg. 16, *R.* 54).[11] The omission of Galveston is explained by the fact that there are no competitive theatres in that city (*supra,* p. 7), but the uniform failure to impose the restrictions in Austin, where there are competing subsequent-run theatres, is, as we later contend (*infra,* pp. 41–43), indicative of common agreement and understanding. Similar evidence of identity of action is furnished by the failure of all the distributors to comply with O'Donnell's demand for a price restriction on subsequent-run exhibitors in the Rio Grande Valley (App. Br., p. 24).

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[11] For all practical purposes, there was complete unanimity in action. For the 1934–1935 season, the season involved in the negotiations, the only departure from uniformity which even appears to be substantial is that Universal's license contracts with subsequent-run exhibitors in Austin included the restrictive provisions requested by Interstate (A. S., par. 12, R. 72). There is, however, no evidence that these provisions were actually enforced against exhibitors in Austin, and in the two following seasons Universal's agreement to impose restrictions was confined to the four cities mentioned above (A. S., par. 12, R. 72–73).

Paramount's agreement with Interstate for the 1934–1935 season provided for restrictions on subsequent-run theatres in Galveston (A. S., par. 12, R. 68). Since there were no competitive theatres in that city, the agreement in this respect was purely nominal.

Metro's agreement with Interstate to impose restrictions did not include Houston (A. S., par. 12, R. 66–67), but this omission is wholly without significance because Metro's subsidiary operated a first-run theatre in Houston and Metro did not, prior to the 1936–1937 season, license any pictures for subsequent-run exhibition in Houston (App. Br., p. 24).

The District Court found that while the various distributors did not employ precisely the same language or phraseology in imposing restrictions, "the substance of the restrictions imposed by each distributor defendant was the same" (Fg. 17, *R. 55*). The restrictions imposed for the 1934–1935 season were continued in the two following seasons (Fg. 16, *R. 55*; A. S., par. 12, R. 65–78).

The court below found that either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect (Fg. 20, *R. 56*). It also found that, whereas adoption of the restrictions would be financially beneficial to each distributor if they all alike adopted them, adoption of the restrictions by individual distributors, in the absence of substantially unanimous acceptance, would have caused these distributors to lose some of the business of subsequent-run exhibitors and would have resulted in a serious loss in customer good-will (*ib.*).

On the prior appeal in this cause the Government contended and the appellants denied that the District Court had concluded that the distributor defendants, in agreeing to the restrictions, had acted pursuant to agreement and understanding among themselves. The District Court has now fully sustained the Government's position in the prior appeal. It found (Fg. 22, *R. 56*):

> From the facts set forth in findings 12 to 21, inclusive, and particularly from the

> unanimity of action on the part of the distributor defendants, not *on* [*sic*] one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

The effect of the restraints which were imposed

The District Court found that the restrictions caused some subsequent-run exhibitors to increase their admission price to 25¢ and to forego double-billing of restricted pictures and that practically all of the exhibitors making this increase in admission price "would not have done so but for the restrictions imposed by the distributor defendants" (Fg. 25, *R. 57–58*). It found that the restrictions caused subsequent-run exhibitors who were unable or unwilling to accept the restrictions "to be deprived of the opportunity to exhibit any of the pictures subject to the restrictions, the best and most popular of the new feature pictures" (*ib.*). Another effect of the restrictions in the case of these exhibitors was that "the best entertainment furnished by the motion picture industry" was

withheld altogether from their patrons, "the low-income members of the community" (*ib.*).

The court below also found that the increase in admission prices and the limitation of double-billing resulting from imposition of the restrictions had deflected attendance from subsequent-run theatres to Interstate's first-run theatres, thereby reducing the income of the former, and that there was no evidence that this loss of income had been offset by the higher admission prices which, because of the restrictions, some of the subsequent-run theatres had adopted (Fg. 26, *R. 58*).

The District Court's legal conclusions and decree

The District Court concluded as a matter of law that the distributor defendant, by acting pursuant to a common plan and understanding in imposing the restrictions in question, engaged in a combination and conspiracy with Interstate, Hoblitzelle and O'Donnell, and with each other, in unreasonable restraint of interstate commerce (*R. 58–59*). It also concluded as a matter of law that, apart from any such combination and conspiracy, the respective distributors, in entering into binding agreements with Interstate to impose upon subsequent-run exhibitors restrictions as to minimum admission price or against double-billing, illegally combined to restrain interstate commerce, and that "such undue and unreasonable restraint of interstate commerce is not within any privilege or immunity conferred

upon the distributor defendants by the copyright law" (*R. 59–61*).

The decree which the court entered enjoins the enforcement of the restrictive provisions of the distributors' licensing agreements with subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio (*R. 77–78*). It also enjoins the distributor defendants from including in their future contracts with subsequent-run exhibitors, in any city where the exhibitor defendants operate theatres, restrictions as to admission price or as to double-billing, as the result of any combination among the distributor defendants, "or between the said distributor defendants, and any of them," and the exhibitor defendants, "or any of them" (*R. 78*).

SUMMARY OF ARGUMENT

I. A conspiracy in restraint of trade, which is a partnership in criminal purposes, is seldom capable of direct proof and may be inferred from a common course of conduct or other circumstances. In the present case the circumstances create an almost irresistible presumption that the action of the distributor defendants in all agreeing to impose the same restrictions on competitors of Interstate was the result, not of chance, but of consultation, arrangement and agreement among the distributors to take like action upon Interstate's demands.

The same demands were presented to each distributor. One of the three demands presented was uniformly rejected. The other two were uniformly accepted as to four of the cities included therein. These same two demands were, with substantial unanimity, rejected as to a fifth city similarly situated. This uniform variation between demand and acceptance is striking evidence that the distributors acted in concert in agreeing to impose restrictions upon subsequent-run exhibitors. An additional reason for inferring such concert of action is that if substantially all the distributors agreed to impose the same restrictions, each would benefit, whereas if substantially all did not so agree, the distributors imposing restrictions would lay themselves open to serious injury and damage through loss of business and customer good will. The distributors were thus under every inducement to agree among themselves to take like action upon the demand for restrictions upon Interstate's competitors. The inference of concert of action arising from the evidence is also strengthened and fortified by the failure of the defendants to call to the witness stand the policy-determining officials of the distributor defendants who alone were in a position to state whether the various distributors had agreed to take common action respecting imposition of the requested restrictions.

II. The declared objective of Interstate when it addressed the same two letters to all the distribu-

tors was to have all or substantially all of them join in imposing certain restrictions upon subsequent-run exhibitors. When each distributor entered into the requested agreement with Interstate, it gave its assent to, joined in carrying out, and became a party to the common and joint undertaking proposed by Interstate. Each distributor linked itself with the others and with Interstate in a common enterprise when, with knowledge that all were invited to unite in a plan to align the distributors in a solid front against subsequent-run exhibitors, it carried out its part of the proposed combination by agreeing to impose restrictions on its own subsequent-run licensees.

III. The admission-price and the double-billing restriction which were imposed upon subsequent-run exhibitors effected an undue and unreasonable restraint of interstate commerce. Whether or not restraints of this kind are necessarily undue and unreasonable, the particular restrictions which were imposed were such because of the harsh, arbitrary, and inequitable manner in which they operated. The restrictions applied to all the subsequent-run theatres alike. They made no allowance for the radical differences in the character of their business operations or for the resulting radical differences in the effect of the restrictions upon these operations. Although the avowed purpose of the restrictions was protection of Interstate's first-run theatres against competition of

subsequent-run exhibitors, the restrictions affected very slightly or not at all the subsequent-run exhibitors who were most competitive and, on the other hand, severely burdened and oppressed those that were least competitive.

If, as the Government contends, the restrictions were imposed by virtue of a conspiracy among all the distributors and Interstate, there was a combination between those having a monopoly of certain pictures required by motion-picture theatres and a company having a substantial monopoly of the motion-picture theatres in the cities where it operates, to deprive competitors of this company of the opportunity to obtain their supplies in a free and untrammeled market. The case clearly falls within the holdings of this Court condemning as illegal under the Sherman Act restraints imposed by a monopolistic combination when the parties refuse to deal with outsiders except upon terms fixed by the conspiring parties.

But even if the distributors and Interstate were not all parties to a joint combination, the restrictions which were imposed effected an undue and unreasonable restraint of interstate commerce. The restraint was coercive since subsequent-run exhibitors were thereby prevented, unless they conformed to the restrictive requirements, from obtaining pictures needed in their business. The restraint was undue and unreasonable in that its purpose was to limit competition and to maintain

prices although the competition which was restrained was not in any respect unfair. Another element of unreasonableness arises from the fact that the restraints were imposed to strengthen the monopoly position of the party proposing the restraints. Finally the restraints must be condemned on the analogy of the cases holding that agreements to maintain resale prices are illegal under the Sherman Act.

IV. The restrictions imposed upon subsequent-run exhibitors are not removed from the prohibitions of the Sherman Act by any privileges conferred by the copyright law even if there was no joint conspiracy between the distributors and Interstate, but merely a series of separate agreements between it and the several distributor defendants. The copyright law confers upon the copyright owner the exclusive right to copy or publish. The courts imply that the right thus conferred permits the copyright owner to license others to exercise these rights and to attach to the license conferred such conditions as are reasonably necessary to enable the copyright owner to secure the reward from his exclusive right contemplated by the copyright law. But the courts, in interpreting the extent of the privilege so conferred, refuse to sanction an extension of the copyright privilege so as to permit, under the guise of their exercise, encroachment upon the general policy of the statutory and common law in favor of freedom of trade, to

which the copyright grant constitutes a limited exception.

Newsreels, travel pictures, and "comics" are almost universally shown in motion-picture theatres together with the feature picture. Accordingly, when one of the distributor defendants as the owner of a copyright on a feature picture fixes the minimum admission price of theatres licensed to exhibit a copyrighted feature picture, it extends its control to matters which lie beyond the confines of its copyright. This provision of its agreement with the licensee is therefore governed by general law and is not exempt therefrom by reason of special immunity derived from copyright law. The situation is analogous to the attempt by a patent owner to extend his limited monopoly over a machine or over a product to unpatented materials and supplies used in or in connection with the patented machine or product.

Irrespective of the foregoing considerations, the restrictions in this case were imposed by virtue of agreements solicited and obtained by Interstate, which owned no copyrights whatever. An unreasonable restraint of interstate commerce imposed by a combination of patent or of copyright owners to make a united exercise of their patent or copyright privileges is not within any immunity given by the patent or copyright law since the restraint flows from the combination rather than from the

individual patent or copyright monopolies. *A fortiori*, a restraint such as that here involved, instigated by a non-copyright owner and resulting from a combination between him and a copyright owner, is outside any immunity given by copyright law. This distinction between imposition of restrictions on licensees by the copyright owner acting for himself alone and imposition of restrictions by agreement between him and a third person is more than technical; it rests upon a substantial difference in the relation of the restrictions to the copyright privilege. The copyright owner, acting individually, will impose restrictions only in so far as he believes that they will promote his own interests as owner of the copyright. But when restrictions are imposed on subsequent licensees because of agreement with the first licensee, the controlling factor in the agreement is likely to be, as in fact it is in this case, the interests of the non-copyright owner. The resulting restraints then really flow from the acts and will of the non-copyright owner and the copyright owner is merely the medium through whom the restraints are made effective.

ARGUMENT

I

THE DISTRIBUTOR DEFENDANTS AGREED AND CONSPIRED AMONG THEMSELVES TO TAKE COMMON ACTION UPON THE DEMAND MADE BY INTERSTATE THAT THEY IMPOSE CERTAIN ADMISSION-PRICE AND DOUBLE-BILLING RESTRICTIONS UPON SUBSEQUENT-RUN EXHIBITORS, AND THE DISTRIBUTOR DEFENDANTS THEREBY CONSPIRED WITH EACH OTHER AND WITH INTERSTATE TO IMPOSE THESE RESTRICTIONS

Appellants do not deny that a combination and conspiracy among the distributor defendants and Interstate is established if the evidence sustains the District Court's finding that the distributor defendants, in agreeing to impose certain admission-price and double-billing restrictions upon subsequent-run exhibitors which Interstate had demanded, entered into these agreements by virtue of and pursuant to an agreement among themselves to act in concert upon Interstate's demand. The initial issue in this case, therefore, is the sufficiency of the evidence to sustain this finding. The issue thus raised calls for some consideration of the character of the evidence by which a conspiracy to restrain interstate commerce may be established.

A. The character of the evidence requisite to establish a conspiracy to restrain interstate commerce

This Court has said that a conspiracy to restrain interstate commerce "is a partnership in criminal

purposes." *United States* v. *Kissel*, 218 U. S. 601, 608. Since those who conspire to do an unlawful thing do not avow their conspiracy openly or set it out in writing, direct proof of conspiracy is usually lacking. It is well settled, therefore, that a conspiracy may be inferred from the acts and conduct of the parties concerned.

In *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, the evidence showed that the members of certain associations of retailers circulated among themselves a list of the names of wholesalers who sold directly to ultimate consumers. There was no agreement among the retailers to refrain from dealing with listed wholesalers nor was any penalty provided for the failure so to refrain. But since the facts gave rise to a compelling inference that the members of the association had united in a common undertaking to prepare and circulate this "blacklist" for the purpose of causing the members to withhold their patronage from the concerns listed, the evidence was held to show an illegal conspiracy in restraint of interstate commerce. The Court said (p. 612):

> But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by con-

certed action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

In *American Column and Lumber Co.* v. *United States*, 257 U. S. 377, the evidence was held to show a conspiracy to promote higher prices and to limit production because the activities of the members of a trade association in carrying out an "open competition plan" necessarily produced these effects and could not adequately be explained except in relation to a purpose to accomplish such ends. This was held even though the facts did not warrant any inference of an agreement upon the specific prices to be charged or upon the extent to which production should be limited.

From the standpoint of the character of the evidence which may be resorted to and of the permissible inferences therefrom, the question is the same where the fact of combination is clear and the controversial issue is the nature of the restraints within the scope of the combination and where, as in the instant case, the nature of the restraints which were imposed is clear and the controversial issue is whether there was combination and conspiracy with respect to such restraints. A combination or a conspiracy to restrain commerce may be "implied from a course of dealing or other cir-

cumstances." *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99.

B. The parallel action of the distributor defendants upon the demands made upon them by Interstate and by Texas Consolidated not only justifies, but requires, the District Court's finding that they agreed and conspired among themselves to take common action upon these demands

The law is clear that a conspiracy to restrain trade may be inferred from a common course of conduct or other circumstances, and it seems equally clear that, under all the circumstances of the present case, the practical identity in action of the distributor defendants justifies, and indeed requires, the finding of the District Court that they agreed among themselves to take like action upon the demands made in the O'Donnell letters.

In attacking this finding the defendants offer two arguments: (1) that the same demands were presented to each distributor defendant and therefore it may be inferred that the similarity of their acceptance was not due to agreement; (2) that it was to the financial interest of each distributor defendant to accept these demands and for this additional reason independence of action may be inferred.

The difficulty with these arguments is the fact that they tend to support the conspiracy just as much as to rebut it. A conspiracy in restraint of trade is ordinarily accompanied both by identity of agreement and advancement of financial interest.

It is hard to imagine a conspiracy where the conspirators are not united on the same plan of action. It is also hard to imagine why a conspiracy in restraint of trade should be formed if it were not in the financial interests of the conspirators. Of course identity of action coupled with advancement of financial interests do not *necessarily* establish a conspiracy. There is always the possibility that the parties were thinking along the same channels, and that the identity was the product of chance. Nevertheless, these two factors are usually integral parts of every conspiracy, and evidence of them is ordinarily the initial step in the proof of combination in restraint of trade. That proof must go further we admit. However, we are not aware that the existence of these two usual elements in a conspiracy in restraint of trade has ever before been used as arguments against the existence of an alleged conspiracy. It is like using the fact that identical bids were submitted as positive proof that the bidders did not get together in advance of the bidding.

The circumstances which make it well-nigh impossible that this identical action was the product of mere chance will be developed in detail. Briefly summarized, they are these: While the acceptance by the distributors was substantially identical, acceptance did not correspond with the demands originally presented—all of the distributors alike failed to assent to one of the three demands presented to them and in the case of the other two

demands all distributors alike failed to agree to these demands as to one of the cities included in the demands. Such a uniform variation can hardly be the product of chance. If it is not conclusive proof in itself, because of the laws of probability, at the very least it puts the appellants under the burden of furnishing an adequate explanation of the uniform variation between demand and acceptance.

(1) *The uniform failure to impose the requested restriction on subsequent-run exhibitors in the Rio Grande Valley*

The O'Donnell letter of July 11, 1934, made two demands for an admission-price restriction of 25¢ on subsequent-run exhibitors. One demand covered feature pictures which had been exhibited in any Interstate theatre charging an admission price of 40¢ or more and the other covered any feature picture which had been shown in a Texas Consolidated first-run theatre in the Rio Grande Valley charging an admission price of 35¢ or more.

The principal explanation offered by appellants for the uniform acceptance of the Interstate demand and the uniform rejection of the Texas Consolidated demand is that the two demands were materially different. Appellants contend (Br., pp. 50–52) that the Interstate request was that any feature shown in one of its first-run theatres charging 40¢ or more for admission should not thereafter be exhibited *in the same city* for less than 25¢ admission, whereas the Texas Consolidated re-

quest was that any feature picture shown in one of its first-run theatres in the Rio Grande Valley charging 35¢ or more for admission should not thereafter be exhibited *in any city located in the Valley* for less than 25¢ admission. We submit that this interpretation of the Texas Consolidated request, which is in direct conflict with the finding of the District Court (Fg. 12, *R. 53*), is clearly erroneous.

Appellants base their interpretation on the italicized words in the following sentence in O'Donnell's July letter: "We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs *in the Valley* at 25¢." It is true that the italicized words, on their face, have an application as broad as that which appellants ascribe to them, but it is also true that the language used in stating the request by Interstate, both in the letter of April 25, 1934, and in the letter of July 11, 1934, has, on its face, an equally broad application. In the April letter O'Donnell wrote that, as to pictures shown in an Interstate first-run theatre charging 40¢ or more for admission, "we are going to insist that *subsequent run prices* be held to a minimum scale of 25¢" (A. S., par 10, R. 63). In the same letter he wrote that these pictures "must not be exhibited *in the subsequent runs* at less than 25¢ at any future time" (*ib.*). In his July letter he wrote that Interstate would not purchase pictures

for exhibition in its first-run theatres charging 40¢ or more for admission unless distributors agree that these pictures "will never be exhibited at any time or *in any theatre*" at an admission price of less than 25¢ (A. S., par. 11, R. 64). There is nothing further in either of these letters tending to restrict the scope of the quoted words.

The O'Donnell letters are phrased in the language of one business man addressing another rather than with the meticulous care for precise expression appropriate to a legal document. Having regard for the fact that the purpose of O'Donnell's requests was to protect first-run houses against competition from subsequent-run houses, the requested restrictions were naturally understood as applicable only to the area of competition, that is, to subsequent exhibition in the same city in which there had been a first-run exhibition in an Interstate or Texas Consolidated theatre. In any event, the conclusive answer to appellants' contention is that, since the language of the Interstate and of the Texas Consolidated request was equally general, the requests cannot be differentiated by giving one of them a broad application and the other a limited application.

Appellants' second argument to show that the uniform elimination of Valley cities from the restrictions was pure accident and not concerted action is worthy of some analysis. The appellants rightly feel this uniform refusal to accede to a de

mand is an odd coincidence requiring explanation. Their explanation is that "There are no facts stipulated or any evidence to show that it was to the financial interest of any distributor to grant the request of Texas Consolidated." (Br., p. 52.) Therefore, they infer there was no reason proved for implying a conspiracy or uniformity of action. The Court will recall that earlier in the brief appellants insisted that an inference of conspiracy was rebutted by proof that the distributors acted to advance financial interests. Now they claim the same inference is rebutted because that proof is *lacking*. We consider the coincidence of this uniform refusal to accede to the demand of Texas Consolidated significant evidence of conspiracy. It is true as appellants assert that "the Government asked no question of any witness concerning the situation in the Valley." The witnesses were hostile. The Government had developed one of those circumstances which was difficult to explain on any theory of pure chance. The burden was on the defendants to explain it.

The District Court found that there was no evidence that the exhibitor defendants withdrew the demand for a price restriction in the Rio Grande Valley prior to or during the negotiations with the distributors (Fg. 18, *R. 55*). Appellants point out (Br., p. 53) that there was likewise no evidence that they continued to press this demand during these negotiations. The demand having been made

and negotiations having immediately ensued,[12] the presumption, in the absence of any evidence of withdrawal, is that the demand was not withdrawn. The Government is entitled to rely upon the inference of combination arising from the parallel action of the distributors without negativing the existence of all possible facts or circumstances which, had they existed, might have destroyed this inference.

(2) *The uniform failure to impose the requested restrictions in Austin*

Interstate requested that the distributor defendants agree to impose restrictions as to admission price and as to double-billing on subsequent-run exhibitors in the cities in which it operated, but in one of the six cities, Galveston, there were no competing theatres. Pursuant to this request, all of the distributors imposed both restrictions on subsequent-run exhibitors in four of the other five cities, but (with the possible exception of Universal for one season only) (*supra*, pp. 18–19), none of them imposed, pursuant to the same request, either of the restrictions in Austin. Here, then, is a second striking example of unanimity of action.

Appellant's principal contention in this connection (Br., pp. 54–57) is to deny that the District Court was correct in finding (Fg. 16, *R. 54*) that

[12] In the case of at least two distributors, agreement upon restrictions was reached within less than a month from the letter of July 11, 1934 (A. S., par. 12, R. 66, 76).

there was substantial unanimity of action respecting Austin. The Government submits, however, that the instances of alleged diverse action which appellants cite do not show diversity in their agreements with Interstate.

Appellants point to the fact that the forms of license agreements which Metro, RKO, and Vitagraph employed generally throughout the United States during the 1934–1935 season contained restrictions against double-billing. It may be assumed that these license provisions were incorporated in contracts made with their subsequent-run licenses in Austin, but this is no indication whatever that these distributors agreed with Interstate to impose the double-billing restriction in Austin. Moreover, in the case of the price restriction, which was imposed solely by virtue of agreement with Interstate, each of these distributors confined the restriction to the cities of Dallas, Fort Worth, Houston, and San Antonio (A. S., par. 12, R. 66–67, 75, 77).[13]

[13] For reasons already stated (*supra*, p. 20), Metro did not agree to impose any restrictions in Houston.

Appellants suggest (Br., pp. 56–57) that when the Agreed Statement of Facts states that a restriction was imposed in certain named cities, this is not the equivalent of a statement that the restriction was not imposed in the Interstate cities not named therein. Such an interpretation of the effect of the Agreed Statement does violence to its purpose and nature, which was to set forth a *complete* résumé of *all* action taken by the distributors with reference to the restrictions requested in the O'Donnell letters.

Appellants also point to the fact that United Artists had long had a policy against double-billing, as well as a "general policy" (*supra*, p. 12) against subsequent exhibition of its pictures at less than a 25¢ admission. The situation as to it is like that discussed above. In so far as this policy of United Artists may have led to restrictive provisions in its contracts with subsequent-run exhibitors in Austin, no possible inference can be drawn that this was done by reason of agreement with Interstate. The stipulated facts relative to the action of United Artists (*ib.*, R. 73–74) clearly indicate that its agreement with Interstate did not include Austin.

The only other alleged instance of diversity, apart from Universal, is that Interstate, in its contract with Fox for the 1934–1935 season, agreed to observe both restrictions in its own subsequent-run theatres and did not limit its agreement to Dallas, Houston, Fort Worth, and San Antonio. This is without significance. Interstate was thereby merely carrying out the commitment which it made when it requested the restrictions, that it would observe the restrictions in its own theatres. Furthermore, its subsequent-run theatres in Austin were charging 25¢ for admission (A. S., par. 7, R. 58), so that observance of this minimum in Austin did not in fact constitute any restriction upon its theatre operations in that city.

Appellants seem to urge (Br., pp. 57–58) that the situation in Austin should be wholly excluded

from consideration because the Government's testimony and certain statistics included in the Agreed Statement of Facts were limited to Dallas, Fort Worth, Houston and San Antonio. Proof relating to the effect of the restrictions upon subsequent-run exhibitors was naturally limited to the cities where the restrictions were actually imposed, but this limitation in the scope of certain evidence furnishes no reason for disregarding the inference of agreement and combination arising from uniform failure to extend the restrictions to Austin.

Appellants state (Br., pp. 57–58) that it is not definitely shown that the competitive subsequent-run theatres in Austin charged less than 25¢ for admission or that they double billed. But there was evidence that independently operated subsequent-run theatres in Texas customarily charged 15¢ or 20¢ for admission and generally double billed, and 17 of the 18 theatres of this kind whose operations were described were shown to have charged less than 25¢ for admission (*supra*, p. 11). One other point mentioned by appellants, the fact that Austin is smaller in size than the four cities where restrictions were imposed, might have led *some* of the distributors to refuse the restrictions in the smaller city, while accepting them in the larger cities; but it is not reasonable to suppose that *all* would have pursued this course if they had been acting wholly independently, without prior consultation, arrangement, or agreement.

(3) *The inference of agreement arising from the distributors' unanimity of action in all agreeing to impose such restrictions in the principal Interstate cities*

The foregoing discussion has dealt with the involved and insubstantial circumstances on which appellants rely to rebut the inference arising from their uniformity of action in the cities and area where the restrictions were not affirmatively imposed. Our principal reliance, however, is obviously upon the identity of action by the distributors where positive action was taken.

To explain the positive uniformity of action in imposing restrictions in Dallas, Fort Worth, Houston, and San Antonio, the principal reason given by appellants is that the action was financially beneficial to each distributor. We have already pointed out that this explanation works both ways since financial interest is an ordinary part of every conspiracy. We will now go further and show that the financial interests of the defendant would be advanced only if concerted action were taken by at least the greater part of them.

The question confronting each distributor assuming that it acted in the matter truly independently of any other distributor, would be the effect upon it if it accepted the restrictions and any representative number of the other distributors did not. The question which it had to decide was whether the increased license fees which, by reason of its acceptance of the restrictions, it could expect to receive from Interstate, the first-run

exhibitor, would or might be more than offset by tangible or intangible losses in other directions. If so, and if such losses would not be suffered if substantially all the distributors accepted the restrictions, the various distributors were under every inducement to agree among themselves upon a common course of action, prior to agreeing with Interstate to impose the requested restrictions. The Government proposes to show that the conditions just stated are those under which the distributors gave their assent.

Restrictions of the kind proposed were unprecedented (*supra*, pp. 11–13) and were strongly opposed by the independent exhibitors, who were organized (*supra*, pp. 15–16). If certain distributors had agreed to impose the restrictions and others had not, the subsequent-run exhibitors in Interstate cities would have obtained their feature pictures from the distributors who did not impose the restrictions and the distributors who did impose restrictions would have lost this business, a loss far from negligible.[14] But this does not measure the full extent of the probable loss of these distributors. An organized campaign by the independent exhibitors of Texas to withhold business

[14] In the 1934–1935 season the revenue received by the distributor defendants from exhibitors other than Interstate located in Interstate cities was $369,594.72, or 39% of the revenue of $944,452.85 which they received from first-run exhibitions in Interstate theatres (A. S., pars. 5–6, R. 52–53).

from the distributors imposing restrictions, a movement which would serve as a warning to the distributors not to extend the objectionable practice of admission-price and double-billing restrictions, was likely. If this had occurred, the business lost would not have been confined to that of the subsequent-run exhibitors in Interstate cities. Certainly the damage resulting from loss of the customer good-will of the independent exhibitors was potentially serious.[15]

All danger of losses of this kind would be removed, however, if *all* the distributors agreed to the restrictions. The subsequent-run exhibitors directly affected would then have no alternative source of supply for pictures of the quality demanded by their patrons and neither these exhibitors nor other independent exhibitors could translate their opposition to the restrictions into actual withholding of business since, with all the distributor defendants taking the same action, a shift of business from one to another would be meaningless and ineffective.

There is a further consideration which powerfully supports the view that the distributors recognized, and had acted upon the belief, that imposition of the restrictions by individual distributors,

[15] Population figures furnish a very rough base for estimating the possible stakes involved. On the basis of 1930 census figures, the population of the four Interstate cities where restrictions were imposed was, in round figures, 945,000 (see App. Br., p. 57) and the population of Texas 5,824,000, or a ratio of about 1 to 6.

in the absence of substantially unanimous action, was a dangerous and undesirable step to take. It is stipulated that the practices which the restrictions prohibited reduce the total license fees received by the distributor (A. S., pars. 18–19, R. 79). Appellants cannot deny that the distributors were aware of the facts so stipulated—appellants' argument that the distributors' unanimous action on the restrictions is not indicative of agreement is based upon the premise that each distributor was aware that imposition of the restrictions would be to its own self-interest. Under these circumstances, how account for the fact that, with the exception of United Artists (whose business differed materially from that of the other distributors), not one of them had previously undertaken to advance its own interests by imposing the 25¢ admission-price restriction on subsequent-run exhibitors?[16] Obviously any distributor could take this step without prior demand by Interstate and without making the restriction a matter of agreement with Interstate.

To a lesser extent, the same question demands answer in connection with the general failure of the distributors, prior to their unanimous action, to prohibit double-billing of the pictures covered by Interstate's demand. Other than United Artists,

[16] There is testimony which is open to the interpretation, although the meaning is not entirely clear, that Vitagraph had previously imposed a 20¢ admission-price restriction on subsequent exhibition of its Class "A" pictures (R. 201–202).

only one distributor (and it only for one prior season) had previously undertaken to prohibit double billing (*supra*, p. 13).

Appellants may urge that the experience of United Artists demonstrates that the restrictions could be successfully imposed by an individual distributor. We submit that no general conclusions can be drawn from the experience of this distributor. Its business differed from that of any of the other distributors, in that it specializes in the production of a few pictures of very high quality and it makes "individual contracts per picture" whereas the other distributor defendants enter into contracts which cover the pictures for an entire exhibition year (R. 180). How different its business is from that of the other distributor defendants is shown by the figures on releases. In the 1934–1935 season it released eight feature pictures and the smallest number released by any other distributor defendant was 39 and the average for the other seven distributors was 47 (A. S., par. 3, R. 50–51).[17] For the next season United Artists released 15 pictures and the smallest number released by any other distributor defendant was 28 and the average of the other seven distributors was 50 (*ib.*).[17]

[17] In these computations the releases of "20th Century" are included with those of Fox, 20th Century later becoming a part of the Fox organization (A. S., par. 10, R. 62). Prior to this amalgamation, 20th Century was evidently not a major distributor and it was not included among the distributors to whom the O'Donnell letters were sent.

The assumption upon which appellants discuss the question of relative advantage or disadvantage to an individual distributor from acceptance or non-acceptance of the restrictions, namely, that the distributor was confronted with a choice between losing the first-run business of Interstate and possible loss of some of the business of subsequent-run exhibitors is, we submit, a highly doubtful and probably false assumption. It is true that this was the proposition which Interstate laid before the distributors, but it is pure assumption that Interstate would ever have carried out its threatened course of conduct if any representative number of the distributors had failed to agree to the restrictions. The variation between the original demands and the distributors' final acceptance is conclusive evidence that the demands were open to modification. Appellants in their reply brief on the former appeal (p. 10) stated that the demands were "invitations to negotiate upon general principles laid down by Interstate."

The first-run business of Interstate was of great importance to the distributors, but opportunity to exhibit in its first-run theatres the best of the distributors' feature pictures was of even greater and more vital importance to Interstate.[18] The situa-

[18] The distributors distributed films throughout the United States. Interstate exhibited pictures in six cities. The distributors could much more easily afford to lose Interstate as a first-run outlet than Interstate could afford to risk a loss in patronage in its large and expensive theatres by cutting itself off from any important source of supply of pictures with good drawing power.

tion was therefore one where mutual self-interest would have dictated a compromise agreement of some sort if some of the distributors had refused to agree to impose the restrictions.

(4) *The significance of the failure to call as witnesses the superior officials of the distributors who participated in the negotiations with Interstate*

Acceptance or rejection of the demands made by Interstate lay wholly within the hands of the home officials of the distributor defendants. Upon receipt of the O'Donnell letters, the branch managers, who "themselves had no authority to agree to the proposed restrictions," immediately referred the letters to their New York offices (Fg. 15, *R. 54*). The branch managers were in no position to know, nor did they assume to testify that they knew, what transpired in the way of consultation, agreement, or understanding among superior officials of the various companies with reference to acceptance or non-acceptance of Interstate's demands. One of the branch managers frankly stated (R. 199):

> Of course, I would not know what conversations might have taken place in New York or Los Angeles concerning these restrictions between representatives of our company and representatives of other companies.

The branch managers' complete lack of participation in the formulation of policy respecting the restrictions is indicated by the fact that there was

no correspondence whatever relating to the restrictions in the files of four of the branch managers, while in three other cases the correspondence did not go beyond the point of forwarding O'Donnell's July letter to the company's home office (R. 152–156, 158–159).[19] The branch managers took part in the conferences on the terms of 1934–1935 contracts, in the course of which conferences each distributor agreed to impose the restrictions, but each distributor was also represented in these conferences by one or more superior officials from outside the State of Texas (*supra*, p. 16). Not one of these policy-determining officials, qualified to state whether the action which his company took was or was not the product of prior consultation, agreement or understanding with other distributors, was called to the witness stand.

This Court has said that when an officer of a defendant company having peculiar knowledge of facts material to the issues fails to testify, "His silence makes strongly against the company." *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52. (See also *Local 167* v. *United States*, 291 U. S. 293, 298; *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154.) The Government does not contend that failure to testify can supply proof of any fact not reasonably supported by the substantive evidence in the case. Its contention is that the inference

[19] A letter written by the eighth branch manager was found (R. 160), but was not introduced in evidence by either party.

of concerted and common action springing from the substantive evidence in this case is supported and fortified by the defendants' failure to summon as witnesses those officials who alone were in a position to refute this inference provided it were false.

Appellants attempt to explain the failure to call these superior officials as witnesses by stating (Br., p. 61) that at the close of the Government's testimony the question of conspiracy among the distributors "did not appear to be" an issue in the case. We submit that the testimony which they offered through certain branch managers that these managers had personally acted without consultation or agreement with other distributors (*supra*, pp. 17–18) is inconsistent with the position now taken. Appellants' further contention (Br., pp. 61–62), that the testimony of O'Donnell and the branch managers fully covered the ground and that the testimony of the distributors' superior officials would therefore have been merely cumulative, must be rejected because the testimony referred to fell far short of covering the ground (*supra*, p. 18).

C. Cases presenting the question of inferring agreement or combination from the unanimous action of distributors of motion-picture films

Appellants rely upon *Shubert Theatre Players Co.* v. *Metro-Goldwyn-Mayer Distributing Corp.* and *Rolsky* v. *Fox Midwest Theatres, Inc.*, two unreported decisions by federal District Courts, and

Glass v. *Hoblitzelle,* 83 S. W. (2d) 796,[20] a decision by the Texas Court of Civil Appeals. Where the issue is whether the evidence shows conspiracy, decisions in other cases have very little weight. This is true, even though part of the evidence relating to conspiracy in the other cases consisted of acts or conduct similar to some of the acts or conduct relied upon as evidencing conspiracy in the case under consideration.

In contrast with the conclusions reached in the cases cited by appellants, we call attention to *Vitagraph, Inc.* v. *Perelman,* 95 F. (2d) 142 (C. C. A., 3rd), certiorari denied October 10, 1938, affirming *Perelman* v. *Warner Bros. Pictures,* 9 F. Supp. 729 (D. C., E. D. Pa.). This was a suit under the Sherman Act by an exhibitor in Philadelphia to enjoin a conspiracy among various distributors to prohibit double-billing by exhibitors in that city. There was evidence that the defendants had for some years been "trying in every possible way to restrict" double-billing and that at a meeting of exhibitors, producers, and distributors in May 1934 a representative of the latter, speaking on their

[20] This was an appeal from an interlocutory order denying a temporary injunction in a suit under the antitrust laws of Texas. The trial court rested its decision upon five distinct grounds, one being the insufficiency of the evidence to show conspiracy. While the appellate court stated that it approved all of the conclusions of the trial court, it discussed three of these at length but it did not even refer to the lack of proof of conspiracy.

behalf, stated that a method had been devised to stop this practice and that the distributors could take and had taken steps to stop it. The defendants' branch managers in Philadelphia testified that there was no conspiracy or concerted action between the defendants with reference to prohibiting double-billing and that their contract provisions forbidding the practice were the result of independent judgment. Both the District Court and the Circuit Court of Appeals, in holding that the evidence established an illegal conspiracy to restrain interstate commerce, regarded the distributors' unanimity in prohibiting double-billing as persuasive evidence of conspiracy. See 95 F. (2d) 142, 146; 9 F. Supp. 729, 731.

II

THE DISTRIBUTOR DEFENDANTS CONSPIRED WITH EACH OTHER AND WITH INTERSTATE TO IMPOSE THE RESTRICTION IN QUESTION EVEN IF, AS APPELLANTS CONTEND, THE AGREEMENTS BETWEEN THE VARIOUS DISTRIBUTORS AND INTERSTATE WERE ENTERED INTO WITHOUT PRIOR AGREEMENT OR UNDERSTANDING AMONG THE DISTRIBUTORS TO TAKE UNIFORM ACTION ON INTERSTATE'S PROPOSALS

We have previously discussed the question of conspiracy among the distributors upon the basis that the evidence establishes that the distributor defendants agreed among themselves upon a common course of action with reference to imposition of the restrictions. We now contend that, even if the evidence fails to show an agreement of this kind

among the distributors, their common agreement with Interstate to impose restrictions made them parties to such a conspiracy.

The objective which Interstate announced when it addressed the same two letters to all the distributors was to subject subsequent-run exhibitors to certain restrictions with respect to every feature picture which had been shown in an Interstate first-run theatre at an admission price of 40¢ or more. Since feature pictures of all the distributors were shown in these Interstate theatres, Interstate's objective could not be carried out unless all or substantially all of the distributors joined in carrying out its proposal to procure imposition of these restrictions. Each distributor was aware that what Interstate was proposing was not a special arrangement between it and Interstate, but was an integral part of a plan by Interstate to unite all the distributors in the imposition of certain restrictions upon subsequent-run exhibitors. If the evidence does not definitely establish that the distributors knew that the letter of April 25, 1934, was sent to all of them, it does definitely establish that they knew this to be true of the final and superseding letter of July 11, 1934, which showed on its face that it was addressed to the local representative of each distributor.

When each distributor entered into the requested agreement with Interstate, it gave its assent to, joined in carrying out, and became a party to the

common and joint undertaking proposed and initiated by Interstate. It is immaterial that the several distributors, in thus participating in and furthering this joint undertaking, may have taken this step without prior understanding or agreement with other distributors as to concert of action. It is also immaterial that the medium for carrying out the conspiracy was a series of agreements between Interstate and each distributor or that the agreements of the several distributors with Interstate may not have been conditional upon the making of like agreements by other distributors. Each distributor linked itself with the others and with Interstate when, with knowledge that all were invited to unite in a plan to align the distributors in a solid front against subsequent-run exhibitors, it furthered the declared objectives of this undertaking by agreeing with Interstate to carry out the particular part in the combination allotted to it—imposing the restrictions in question on its own subsequent-run licensees.

If it be the fact, as we are now assuming, that some of the distributors agreed with Interstate to impose the restrictions without then knowing whether or not all the other distributors would make like agreements, this fact does not make the conspiracy any less a joint one among the distributors and Interstate. The agreements so made were made in response to a proposal for common action by the various distributors and in contem-

plation of such common action. For a conspiracy to be formed, it is not necessary that all the conspirators should become parties simultaneously. Neither is it necessary to consider what the situation would be if, after some of the distributors had agreed to the restrictions, the conspiracy had failed or had materially altered in character because of the failure of other distributors so to agree. In the case before the Court the conspiracy, as originally proposed, was carried out and became effective.

The effect of holding otherwise would be to create a loophole in enforcement of the antitrust laws which is available in no other sort of criminal conspiracy. Suppose that a group of laborers were mutually and financially interested in an act of trespass. Suppose that the ringleader wrote a letter to each of them pointing out the nature of the general plan, offering financial inducements and asking that each agree to assist him in the enterprise. It could scarcely be contended that in order to make this conspiracy complete there woud have to be any further agreement between those who were hired or who contracted to assist the ringleader. In the case at bar, the nature of the general plan was clear to all who were asked to assist. Its purpose was clear—to impose burdens upon competitors. Each of the distributors knew that the others were being approached simultaneously to carry out the plan. Those who join the enterprise under such circumstances have joined in an agreement in re-

straint of trade. Nothing more need be added to complete the conspiracy.

III

THE ADMISSION-PRICE AND THE DOUBLE-BILLING RESTRICTION IMPOSED UPON SUBSEQUENT-RUN EXHIBITORS EFFECTED AN UNDUE AND UNREASONABLE RESTRAINT OF INTERSTATE COMMERCE

A. The restrictions imposed restraints of a harsh, arbitrary, and inequitable character

There are wide differences in subsequent-run theatres, both in the theatres themselves and in the manner of their operation. Appellants nevertheless enforced the same restrictions against all subsequent-run theatres and the result of this failure to make any allowance for the varying character and operations of subsequent-run theatres was that the restrictions severely burdened and oppressed some types of subsequent-run theatres and either did not affect at all or affected very slightly other types.

One major difference between subsequent-run theatres is the difference in the time in which they become entitled to exhibit feature pictures. Just as the contract between the distributor and the first-run exhibitor provides for clearance—a minimum lapse of time between first exhibition and second exhibition—so there is clearance provided for in the contracts with subsequent-run exhibitors, that is, an agreed minimum lapse of time between second and third exhibition, third and fourth, fifth

and sixth, etc. In the Interstate cities the usual brackets of time, computed from first exhibition, were 45, 60, 75, and 90 days (R. 190). While, in general, all the distributors had about the same clearance (R. 196), the clearance on United Artists' pictures was 75 days for Interstate subsequent-run theatres and 90 days for other subsequent-run theatres (R. 214). One independent exhibitor testified that his pictures were shown about 120 days behind the first exhibition (R. 112).

The second-run exhibitor, of course, pays higher license fees on account of his earlier exhibition time as compared with second-, third-, or fourth-run exhibitors and, in turn, he receives, and offers to his patrons what is in effect a superior product. The subsequent-run theatres able to pay these higher license fees are those that are relatively large and modern and located in reasonably prosperous neighborhoods and the higher license fees which they pay are offset by the higher admission prices which they charge. The poorer class of subsequent-run theatres offering a staler product and having less commodious accommodations and less modern equipment, cannot successfully compete except by charging a lower admission price and, frequently, by offering an additional inducement in the form of two feature pictures for one price of admission. Accordingly, the better class of subsequent-run theatres, the "upper crust" of the group, usually exhibiting second-run, charging 25¢ or per-

haps more for admission, and not double-billing, is not affected by restrictions which require a 25¢ admission charge and limit double-billing while the poorer class of subsequent-runs, offering third-, fourth-, or fifth-run exhibitions, either cannot meet the requirements at all and are thus denied the best product of the industry, no matter how stale, or are forced to charge the same admission price and to operate upon the same basis as rival theatres offering a fresher product under more attractive conditions.

The restraints imposed here are just as unreasonable as would be the restraint if a combination were formed to compel dealers in secondhand automobiles to sell all cars of the same make and body-type at the same price, irrespective of the age of the car, its mileage, or general condition.

The harsh and arbitrary character of the restraints imposed in this case, originating with Interstate and enforced by agreement between it and a group of distributors having substantial monopoly power, is emphasized by the fact that practically all of Interstate's subsequent-run theatres were of superior type (R. 190) and by the further fact that *Interstate theatres played an average of 1.7 days ahead of other subsequent-run theatres* (R. 196).[21] It is therefore not surprising that In-

[21] O'Donnell, who gave his testimony, said at another point that feature pictures were shown in Interstate subsequent-run houses either before they were shown in other subsequent-run houses or, sometimes, simultaneously (R. 190).

terstate was willing to observe the requested restrictions in its own subsequent-run theatres, but it would be illusory to view this willingness as indicating that the restraints were either reasonable or fair.

But apart from this particular aspect of unreasonableness, subjecting those differently situated to the same requirements, the undue and unreasonable character of the restraints imposed is manifest. The Government is quite willing that the Court should, as appellants request (Br., pp. 67–68), apply to this case the doctrines of *Chicago Board of Trade* v. *United States*, 246 U. S. 231, and *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344. The contrast between the facts upon which decision rested in the latter case and the facts of the instant case is striking and, when noticed, serves to buttress our view of the present restraints. In that case the Court held that where an industry had long been burdened with capacity in excess of demand and with declining production and prices, a combination among a large number of producers which would eliminate price competition among this group, but without giving them power to fix the market price of the product, and which would at the same time mitigate certain marketing prac-

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One independent operator of a chain of theatres had subsequent-run theatres in a particular section of Dallas which showed ahead of Interstate's theatres in that section (R. 208–209). This independent naturally did not oppose the restrictions and testified for the defendants.

tices which gave buyers an unfair advantage over sellers, does not unreasonably restrain trade. To compare the situation here, it is to be borne in mind that the business of the exhibitor is analogous to that of the retailer. We find, then, that Interstate, with a monopoly of the business of retailing the most valuable product dealt in by these retailers, first-run exhibitions, has combined with those who substantially control the supply of goods required by the retailers, for the purpose of withholding certain supplies from Interstate's competitors unless they accept its dictation of their resale price and other restrictions upon the conduct of their business.

Appellants seem to think that they can establish the reasonableness of the restraints by showing that the competition of subsequent-run theatres was making it difficult for Interstate to operate its first-run theatres profitably at their existing scale of admission prices. This situation represents the every-day workings of competition and there was nothing even verging on the unfair in the competition which the restrictions were intended to and did curb. As Hoblitzelle testified (R. 161–162), Interstate might have met the competition by lowering admission prices in its first-run theatres. This decrease in admission prices would have lowered its license fee payments, which are generally based upon a percentage of the gross receipts (App. Br., p. 9). The other course, and the one followed, was

to maintain its own prices and to compel, by combination with others, competitors to increase theirs; in other words, the familiar form of illegal restraint represented by price-fixing or price-maintenance. Interstate's president viewed the restraints in this light. He testified that he felt that the "constructive thing to do was to try to maintain a fair price structure for the better pictures" (R. 161).

Appellants present the question of reasonableness chiefly from the standpoint of the benefits Interstate would derive from the restrictions. In view of Interstate's monopoly position, which the restrictions strengthened, this is a doubtful ground of justification. But in any event the question whether the restrictions unduly or unreasonably restrained commerce must be determined primarily upon the basis of the effect of the restrictions upon those who were subjected thereto, the subsequent-run exhibitors. We have previously quoted testimony of one such exhibitor as to this effect (*supra*, pp. 15–16). Another testified (R. 148):

> In my estimation it was absolutely necessary for me to use the [restricted] pictures. The showing of these pictures very definitely necessitated a change in my admission price at the Knox Street and Fair Theatres. * * * The effect upon my revenue at the Knox Street Theatre in increasing the price, I would say was to hurt my business around twenty-five per cent on gross receipts. At the Fair Theatre it affected me even more because of the location of the theatre. It is

> in a poor part of Dallas and for that reason I was charging 15¢ to start so it hurt me even more to have to raise it to 25¢.

Appellants do not question the accuracy of the District Court's finding that the restrictions deflected to Interstate's first-run theatres attendance which would otherwise go to subsequent-run theatres (Fg. 26, *R. 58*) but appellants suggest (Br., p. 25) that higher admission prices brought about by the restrictions might offset the income lost through decreased attendance. This is a speculative offset against an assured loss.[22] Furthermore, the subsequent-run exhibitor must be assumed to be the best judge of what is in his own interest. The District Court found (Fg. 25, *R. 57*), with ample evidence to support it (R. 124, 138, 141, 143, 148), that practically all of the exhibitors who were forced by the restrictions to increase their admission price "would not have done so but for the restrictions." As to the exhibitors who found it impracticable to increase admission prices or to forego double billing, the effect of the restrictions was even more burdensome. These distributors were deprived by appellants' combination of the opportunity to show in their theatres the best

[22] Since it is, in effect, stipulated that the restrictions increase the income of Interstate's first-run theatres (A. S. pars. 18–19, R. 79) and since this increase in income could come about only by obtaining attendance which would otherwise go to subsequent-run theatres, the loss in question must be regarded as certain.

and most popular product of the industry. And while these exhibitors undoubtedly competed with some of Interstate's subsequent-run theatres, it is questionable whether they competed at all with its first-run theatres, in the interests of which the restrictions were nominally imposed.

B. The restrictions unduly and unreasonably restrained interstate commerce if, as the Government contends, they were imposed pursuant to a joint conspiracy among the distributor defendants and Interstate

If, as the Government has contended (*supra*, pp. 34–52) the restrictions were imposed by virtue of a conspiracy among all the distributors and Interstate, the unreasonableness of the restraint of trade is so patent as to require little argument or citation of authorities. By such a combination the distributors, having a substantial monopoly of pictures which subsequent-run exhibitors require in their business, agree to refuse to make contracts with subsequent-run exhibitors for the exhibition of certain feature pictures (representing the most prized product of the industry) unless the latter agree to comply with certain drastic restrictions on the conduct of their own business. By the combination the distributors not only limit their own freedom to trade, but deprive subsequent-run exhibitors of the freedom to deal and bargain with each distributor individually upon the question whether either, both or neither of the restrictions

in question, or some modification thereof, shall b
included in their licensing contracts. Combina
tions to refuse to deal except upon the acceptanc
of terms which the parties to the combination hav
agreed to impose have been universally condemne
as illegal under the Sherman Act. *Montague*
Co. v. *Lowry*, 193 U. S. 38; *Eastern States Lumb*
Association v. *United States*, 234 U. S. 600, *supr*
Paramount Famous Lasky Corp. v. *United State*
282 U. S. 30; *First National Pictures, Inc.* v. *Unite*
States, 282 U. S. 44.

The last two cases cited are particularly pert
nent because they involve practically the sam
group of distributors (or their predecessors) as th
distributor defendants here and because the r
straints in those cases were far more innocuo
than those with which we are now concerned.

In the *Paramount* case the distributors agre
that they would contract with exhibitors only in a
cordance with the terms of a certain standard e
hibition contract. This contract left the parti
free to make their own agreement upon price an
upon the kind and number of pictures to be licens
and, for the most part, it merely had the effect
standardizing contract provisions. The only pr
vision to which the exhibitors took serious exce
tion was one for the compulsory arbitration of an
controversy growing out of the contract. Whi
the arbitration procedure set forth in the standa
contract might be regarded as giving the distrib

tors some slight advantage over exhibitors, it was not grossly discriminatory against the latter. Compared with dictation of the exhibitor's minimum admission price, the restraint was negligible. The power to determine sales price—the exhibitor's admission price is the equivalent of the ordinary trader's sales price—is of the very essence of freedom to trade and to compete. The power to determine what shall be offered for sale—in this case, the power to determine whether or not to offer patrons more than one feature picture—is a matter of almost equally grave concern.

In the *Paramount* case, as in the present case, the agreement did not bar *all* competition. Other than the matters as to which there was agreement to take uniform action—in the one case, use of the standard contract and, in the other case, imposition of the admission-price and double-billing restrictions—the distributors were left free to compete with each other for the business of exhibitors and the exhibitor was left free to bargain with distributors for the best possible terms. But, as this Court said in the *Paramount* case (p. 44), "In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangements suppresses all competition between the parties."

In the *First National Pictures* case the distributors, through the medium of local film boards of exchange, set up credit committees to obtain full information concerning all sales or transfers of

theatres and to determine, after investigation, whether the sale or transfer was made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for exhibiting pictures. If the committee found this to be the case, it was to report the amount of cash security which the new owner should put up to guarantee performance of his future exhibition contracts, and the distributors agreed not to make exhibition contracts with the new owner unless he either assumed the uncompleted contracts of his predecessor or gave the required security.

Although the avowed purpose of the restraint was to prevent fraud and deceit, it was condemned because of its coercive effect. The Court said (p. 54):

> The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the film boards and secure their concerted action for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammeled market.

In the present case, without the colorable justification of preventing deceit or unfairness, the distributor defendants and Interstate have combined for the purpose of coercing subsequent-run exhibitors by excluding them from the opportunity to deal in a free and untrammeled market in negotiating for the right to exhibit the best of the new feature pictures, whose supply the distributors control.

The restraints in this case are peculiarly obnoxious since they are the product of a combination of two sets of monopolists, the one having a monopoly of first-run exhibitions and the other a substantial monopoly of the supply of pictures available for exhibition. Even in the absence of monopoly, an alliance between two or more groups of interests, to obtain certain reciprocal advantages by restraining the trade of third persons, is illegal under the Sherman Act. *Brims* v. *United States,* 272 U. S. 549.

C. The restrictions unduly and unreasonably restrained interstate commerce even if, as appellants contend, they were merely the product of a series of wholly independent agreements between Interstate and the several distributor defendants

Even though the restrictions imposed upon subsequent-run exhibitors were solely the product of separate and independent agreements between Interstate and the several distributor defendants, the question whether these restrictions effected an undue and unreasonable restraint of interstate commerce must be determined in the light of their actual operation and effect. In determining such operation and effect, the fact that all the distributor defendants agreed to impose the restrictions cannot be ignored. Under these circumstances the restraint to which the subsequent-run exhibitor is subjected is plainly coercive restraint since there is no source from which he can obtain a supply of

the pictures covered by the restrictions, pictures which are a prime necessity in his business, without complying with the restrictions. On the other hand, if some of the distributors had agreed to impose the restrictions and others had not, the subsequent-run exhibitor would not have been compelled to comply with the restrictions in order to obtain pictures of the superior type shown in Interstate's Class "A" theatres (although he could not have so obtained *all* such pictures), and the restraint upon his operations would have been far less coercive and burdensome.

If it be true, as appellants contend, that the various distributors did not unite in a joint undertaking to bring about imposition of the restrictions by all of them, at least it cannot be denied that they carried out their separate agreements to impose restrictions with the knowledge that all other distributors were doing likewise. Irrespective of whether or not there was such knowledge when the agreements with Interstate for the 1934–1935 season were entered into, such knowledge necessarily existed when the distributors all continued these agreements the two following seasons. Accordingly, if knowledge of the action taken by others be essential in order to judge the character and effect of the restrictions in the light of such action by others this knowledge existed.

Not only were the restraints which were imposed actually coercive in character, but, as we have pre-

viously shown (*supra*, pp. 58–65) they were inequitable, harsh, and arbitrary in the manner of their application to those subjected thereto. In addition, their avowed purpose was to limit competition and to maintain prices. Alhough not *every* agreement to limit competition or to maintain prices unreasonably restrains trade, it is the exception rather than the rule when an agreement of this kind is permissible under the Sherman Act. Finally, the competition which appellants agreed to restrain was not unfair.

The only ground advanced by appellants in support of the reasonableness of the restraints is that they would benefit the conspiring parties, Interstate and the distributors. The fact that a combination in restraint of trade promotes the economic interests of the parties thereto is, however, no defense. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 613, *supra.* Indeed, the very fact that the restrictions were intended to strengthen and abet the monopolistic position of Interstate [23] would seem rather an additional rea-

[23] Interstate, in addition to monopolizing the first-run exhibition business in the cities in which it operated (*supra*, pp. 7–8), controlled about 75% of the *entire* exhibition business in these cities. In the 1934–1935 season it paid in license fees to the distributor defendants $944,452.85 for first-run exhibitions and $133,366.73 for subsequent-run exhibitions, a total of $1,077,819.58, and all other exhibitors in these cities paid as license fees to these defendants $369,594.72 (A. S., pars. 5–6, R. 52–53). Accordingly, Interstate furnished 74% of the total license fees of $1,447,414.30 paid by exhibitors in Interstate cities.

son for condemning them as undue and unreasonable.

But even if it be assumed that a restraint of interstate commerce designed to promote Interstate's financial interests would constitute a merely reasonable restraint, the restraints which were actually imposed cannot be defended upon this ground since they exceeded any reasonable means or measure for attaining this objective. Appellants' evidence is that the restrictions were needed to protect Interstate's first-run theatres against competition of subsequent-run theatres. Obviously those that are principally competitive are those which most nearly approximate what first-run theatres offer, that is, the better class of subsequent-run house. But these theatres usually exhibit second-run, charge 25¢ for admission, and seldom double bill (*supra*, pp. 59–60) and were therefore not affected by the restrictions. In other words, the chief competition was left untouched. On the other hand, the restrictions bore heavily upon the less favorably situated subsequent-run theatres, particularly those that charged 15¢ for admission and showed pictures fourth-, fifth-, or sixth-run; but these theatres can hardly be considered as being in any degree competitive with Interstate's first-run theatres.

The operator of one subsequent-run theatre testified that his admission price before the restrictions was 15¢, that for five months after the re-

strictions went into effect he tried out the policy of showing restricted pictures two days a week at a 25¢ admission price, but found that, although his patrons demanded such pictures, they would not pay 25¢ for admission, that he therefore had to abandon the showing of restricted pictures, that his attendance was then less than when he had been free to show restricted pictures for 15¢ (R. 113). The harsh and inequitable manner in which the restrictions operated is further illustrated by the testimony of this witness that he had no balcony in his theatre, but that there was a competitive Interstate house charging 15¢ for balcony admission and showing restricted pictures (*ib.*).[21] Another subsequent-run exhibitor testified that his theatre was in a neighborhood where "there are mostly railroad people and a bunch of Mexicans," that his admission-price was 15¢, that he "tried charging 25¢ and it didn't work," that his customers said that "they wouldn't give two bits in a 15¢ joint" (R. 109–110). Where, as in these cases, the class of patronage is such that it cannot afford even a 25¢ admission, what chance exists that those whom it serves will pay 40¢ or more for admission to Interstate's first-run theatres if restricted pictures are withheld from these theatres?

The admission price restriction is closely analogous to resale price maintenance and agreements

[21] The admission-price restriction applied only to the admission price to the lower floor.

to maintain resale prices have been repeatedly held to violate the Sherman Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *Schrader's Son Co.*, 252 U. S. 85, *supra*; *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208. When a distributor furnishes a motion-picture film for exhibition in a theatre and receives payment therefor (called a license fee), this is the substantial equivalent of a sale, and when the exhibitor receiving such film permits members of the public to view the picture upon payment of an admission charge, this is the substantial equivalent of a resale. While the analogy is not exact, there is in the instant case an added element of an unreasonable restraint because the agreement calling for the equivalent of resale price maintenance does not run solely between the parties directly involved, but is the product of agreement between the seller (distributor) and a third person (Interstate).

Appellants cite a number of cases (Br., p. 40) sustaining the validity of the conventional covenant by which the vendor of a going business agrees, as part of the terms of sale, to refrain from competing with his vendee for a limited time and within a limited area. In such instance the party whose trade is restrained voluntarily subjects himself to the restraint and he receives due consideration from the vendee for his covenant. These de-

cisions have no application here, where the persons restrained are coerced by a combination between third persons, where the restraint operates in a harsh and inequitable manner, where its purpose is price maintenance and substantial lessening of competition and where it is in aid of monopolistic conditions.

IV

THE RESTRAINTS IMPOSED UPON SUBSEQUENT-RUN EXHIBITORS ARE NOT REMOVED FROM THE PROHIBITIONS OF THE SHERMAN ACT BY ANY PRIVILEGES OR IMMUNITIES CONFERRED BY THE COPYRIGHT LAW

At the outset, it may be useful to analyze the separate elements of the plan which Interstate initiated in this case in connection with the agreements which followed, since both are part of the total scheme which the appellants seek to bring within the protection of the copyright laws. The situation is as follows:

1. A corporation which had a monopoly of the first-run theatres in the largest cities of Texas sought to restrain competition by subsequent-run theatres.

2. Though it held no copyrights itself, nevertheless this corporation through its monopoly position was able to exert great pressure upon those who did own the copyrights.

3. It circularized these copyright owners, pointing out the advantage of assisting it in furthering

its monopoly position, imposing burdensome r
striction on subsequent-run competition.

4. Its letter contained a direct threat that
would be forced to use its monopoly positi
against any copyright owner who refused
"request." [25]

5. The copyright owners yielded. It was to th
financial advantage to do so for two reasons: fir
the ordinary reason for restraining of trade, i.
temporary gain from higher prices as opposed
a long run policy of wider distribution at low
prices; second, the very clear and compelli
reason that a battle between the copyright owne
and a corporation which dominated the exhibiti
outlets in a great section of the country would
costly.

6. The result is that a corporation which own
no copyright was able to effect an actual combi
tion with the majority of copyright owners whi
(1) imposed restrictions upon all its competito
and (2) which put limitation on the times a
places at which copyrighted pictures not includ
in the plan could be shown.

Are such schemes protected by the copyright la
If they are, it means that anyone who dominat
the distribution of any product may use the adva

[25] The threat read as follows (A. S., par. 11, R. 64):

"In the event that a distributor sees fit to sell his prod
to subsequent runs in violation of this request, it definit
means that we cannot negotiate for his product to be
hibited in our 'A' theatres at top admission prices."

tages of his position to induce the owners of either patents or copyright to enter into a plan for controlling the prices and practice of any industry. If the owners of the patents or copyrights do not agree, the monopolist will go elsewhere for his product. If they do agree, the industry will be controlled from top to bottom. To state such a proposition is to refute it.

Appellants do not deny, indeed in their brief on the former appeal (pp. 35–36) they admitted, that the copyright owners themselves could not organize to achieve such a result. *Standard Oil* v. *United States,* 283 U. S. 163, 174; *Straus* v. *American Publisher Ass'n,* 231 U. S. 222. Yet they claim that it is permissible for an outsider to drive them into such an organization by utilizing his power over the distributing field.

To put the matter more simply, appellant's argument is that A, B and C who own patents or copyrights cannot form themselves in a tight organization to control the field. However, if a ringleader comes along, who owns no copyrights or patents, he may form them into a regiment by frankly stating his plan to control prices and practice, pointing out its monopoly advantages and adding such coercive inducements as his position permits.

If this is so, the prohibition against patent or copyright owners combining is a mere form of words. All that is required to accomplish the re-

sult is an organizer who does not happen to own a patent or a copyright himself.

The constitutional provision which marks the limits of the powers of Congress to pass or the Courts to apply patent and copyright laws reads as follows: "The Congress shall have power * * * To promote the progress of science and useful arts by securing to authors and inventors the exclusive right to their respective writings and discoveries." Both the patent and copyright laws have always been interpreted with these purposes in mind.

In *Standard Sanitary Manufacturing Co.* vs. *U. S.*, 226 U. S. 20, the Court refused recognition due patent rights where it was of the opinion that their exercise was a cloak for the formation of a combination in unreasonable restraint of interstate commerce. The Court said (p. 49):

> Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

In that case a non-patent owner devised the scheme to control the patents in the industry involved. He did it by persuading the patent owner of the financial advantage (p. 38) "which would come to his company by an elimination of 'seconds' and removing them as competitors of the better articles of the Standard, confining the competition

to such articles of which the Standard produced 50%. The manager of the Standard and that company yielded to the representation of these advantages." There followed an agreement which in the language of the Court had the following effect (p. 48):

> The trade was, therefore, practically controlled from producer to consumer and the potency of the scheme was established by the cooperation of 85% of the manufacturers and their fidelity to it was secured not only by trade advantages but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail."

While in this case, the holder of the patent acted in conjunction with a trade association, and in the present case Interstate did not deal with the distributors through a trade association, the general objectives were the same in each case, to stabilize prices and to increase the profits of the combining parties. Also, the principal defense was similar to the one here. We quote from the *Standard Sanitary* case (p. 40):

> The contention of the defendant then is that the Standard Company's position and power as owner of the patent, and Wayman's were identical.[26] What it could have done, it is contended, he could do, and its relation to the trade and the relation of other manufacturers to the trade clearly

[26] Wayman was the individual who initially owned no patents and who initiated the agreement of the patent owners.

demonstrate, it is further contended, that as that company could have made the contracts, Wayman could do so.

The Court, in holding that there was an illegal agreement in restraint of trade, necessarily rejected this defense.

A. The principles governing decision of the copyright privileges claimed by appellants

In considering the part, if any, which copyright privileges play in this case, it is well to start with a statement of the nature of the copyright privilege. What the law confers is the exclusive right to copy or publish, just as the patent law gives the exclusive use to make, use and vend. The extent of these privileges is therefore a matter of interpretation and the process of interpretation involves protecting the privileges accorded by the copyright or patent law without so extending these privileges as to permit, under the guise of their exercise, encroachment upon the general policy of the statutory and common law in favor of freedom of trade. The process of interpretation through judicial decision involves, therefore, making an appropriate adjustment of these sometimes conflicting lines of public policy represented, on the one hand, by the reward to the inventor or author which the patent and copyright laws are designed to secure and, on the other hand, by condemnation of restraint of trade and monopoly by both the common law and the federal antitrust laws.

We submit that the course of decision has been and should be guided by these and other considerations of public policy. The words of the statute are too indefinite to permit interpretation of their meaning to be determined by purely dialectical reasoning. Although decision may often be couched in this form, the result achieved depends upon the particular premises selected and public-policy considerations necessarily enter into selection of the premises.

Appellants' contention is that any condition on exhibition which the owner of a copyrighted motion-picture may attach to a license to exhibit is within the owner's copyright privileges if the condition increases the return which he derives from his grant of the right to exhibit. While this Court has said that, in exercising the granted right to vend, the patent owner may license another to exercise this right "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure" (*United States* v. *General Electric Co.*, 272 U. S. 476, 489), this statement of one of the rules applied in interpreting the extent of the patent privilege leaves open the crucial question of what is "reasonably" within such reward.

There are many instances of limitations or conditions imposed as an incident to exercise of the patentee's exclusive right to make, use and vend which have been held to be not within any privilege conferred by the patent law although the limitations or conditions would increase the return re-

ceived by the patentee from exercise of his exclusive rights. It is not within his patent privilege to sell upon condition that the vendee will use the patented article with unpatented materials or supplies furnished by the patent owner. (*Motion-Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502.) It is not within his patent privilege to fix the resale price of the patented article (*Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1) or to sell upon agreement by the vendee to observe resale prices fixed by the patent owner (*United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, *supra*). It is not within his patent privilege to license use of a patented combination on the condition that such use be limited to use in conjunction with an unpatented article or commodity furnished by the patent owner. (*Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458.)

On the other hand, certain other conditions and limitations have been held to be "reasonably" within the reward which the patent law secures to the patent owner. He is within his patent privilege in fixing the price at which one whom he has licensed to make and vend may sell (*United States* v. *General Electric Co.*, *supra*) and in determining the use for which an article may be sold by one whom he has licensed to make and vend, subject to sale for such restricted use (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, affirmed on rehearing on November 21, 1938)

The vice in appellants' reliance upon the language of the *General Electric* case consists in treating this language as if it were a part of the statutory law and therefore an actual source of rights, whereas, in fact, it merely sets forth one, but not the only, principle applied in determining whether the privilege of imposing a particular limitation or condition may be implied from the words of the statute.

In determining the appropriate limits to the exclusive right given the patent or copyright owner, weight is given to the general policy of the law, to which patent and copyright grants are limited exceptions, against monopilization of trade or markets. This Court has said that the monopoly conferred by the patent law should not be expanded by interpretation so as to permit the owner of a patent for a product to "monopolize the commerce in a large part of unpatented materials used in its manufacture"; or the owner of a patent for a process to "secure a partial monopoly on the unpatented material employed in it"—these limitations sought to be imposed by the patentee being "beyond the legitimate scope" of its monopoly. *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27, 32. *supra.*

Likewise, the patent or copyright grant is inherently limited to the extent that exercise of the apparent grant would bring it in conflict with statutory or other legal prohibitions. (See the *Carbice*

case, note 3, pp. 32–33.) In *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20 (*supra*), the Court refused recognition to patent rights which it was assumed that the defendants possessed, since the Court was of the opinion that the exercise of patent rights there involved was a mere cloak or screen for the formation of a combination in unreasonable restraint of interstate commerce. The Court said (p. 49):

> Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Appellants, in order to sustain the immunity which they claim based upon copyright privilege must establish two propositions:

(1) That the owner of a copyrighted motion-picture is within privileges given him by the copyright law if he includes in licenses to exhibit a prescription of the licensee's minimum price of admission and a prohibition of exhibition in conjunction with other pictures (which the licensee is authorized to exhibit under license from other copyright owners).

(2) That such a copyright owner is exercising a privilege derived from the copyright law if he enters into a binding agreement with his first licensee to prescribe the minimum admission price of

subsequent licensees and to prohibit double-billing by such licensees.

B. The owner of a copyrighted motion picture is not exercising a privilege derived from the copyright law when he fixes the minimum admission price to a motion-picture theatre or prohibits double-billing during the period that exhibition of the copyrighted picture is authorized

The owner of a copyright on a motion-picture, in giving a license to exhibit, is exercising privileges derived from the copyright grant when he fixes the time, place, and duration of exhibition and the amount of the licensee's payments, but we submit that he is not within these privileges when he undertakes to fix the minimum admission price which the licensee may charge its theatre patrons during the period the licensed picture is being exhibited. Such a requirement embraces more than the exhibition privilege derived from the copyright owner. It is, we submit, a matter of judicial notice that news reels, travel pictures, and "comics," or some of these, are almost universally shown in motion-picture theatres together with the feature picture. Accordingly, if the owner of the copyright on the feature picture undertakes to control the licensee's admission price, he extends his control to matters which lie beyond the confines of his copyright. The situation is analogous to that where a patent owner attempts to extend his limited monopoly over a machine or over a product to unpatented material

or supplies used in or in connection with the machine or product.

When the licensor of one copyrighted picture fixes the exhibitor's minimum admission price, this restrains not only the trade of the exhibitor, but also the trade of licensors of other pictures shown in the same exhibition. They suffer if the minimum admission price is set at such a high level that it reduces attendance at the theatre and, consequently, license fees based upon receipts from attendance.

Since a motion-picture theatre which acquires the right to exhibit a picture upon paying a fee therefor and then admits the public to exhibition upon payment of an admission price is, in effect, reselling a purchased product, the decisions condemning resale price maintenance, whether or not the article be patented, furnish a strong analogy for regarding an admission-price restriction imposed by the licensor of the picture as governed by the general law rather than by special copyright privilege.

The considerations which have been referred to in connection with an admission-price restriction are applicable to some extent to a double-billing restriction. The restriction interferes not only with the trade of the licensee but with trade of other licensors.

C. An admission-price and a double-billing restriction imposed upon subsequent licensees of a copyrighted motion-picture, under and pursuant to an agreement to impose these restrictions entered into between the copyright owner and the first licensee, are not within any privilege derived from the copyright law

If it be assumed that a distributor defendant would be within his copyright privileges in imposing an admission-price or a double-billing restriction in contracts granting the right to exhibit, it does not follow that the distributor is within these privileges when it imposes these restrictions on subsequent-run exhibitors under and pursuant to an *agreement* with Interstate so to act. In the latter case the restraints are imposed by a combination between one who has a copyright privilege and one who has not. We have seen that a restraint of trade imposed by a combination of patents is not given immunity by the patent law (*supra*, p. 77). *A fortiori*, a restraint imposed by a combination between a copyright owner and a non-copyright owner is outside such immunity.

The distinction which we are drawing between the imposition of restrictions on licensees by the copyright owner acting for himself alone and imposition of the same restrictions by virtue of agreement between him and a third person is more than technical; it rests upon a substantial difference in the relation of the restrictions to the copyright privilege. The copyright owner, acting individually,

will impose the restrictions only if he believes that they will promote his own interests as owner of the copyright. Where, however, he imposes the restrictions on subsequent licensees because of agreement with the first licensee, the interests of the first licensee rather than those of the copyright owner will probably be the dominant factor in imposition of the restrictions. If, as is true in the present case, the first licensee has a monopoly of the best and largest exhibition theatres, it can take advantage of its monopoly position to procure, through the medium of distributors of motion pictures, imposition of restraints upon its competitors. The restraints then really flow from the acts and will of the non-copyright owner; the copyright owner is merely the medium through whom the restraints are made effective.

The restrictions upon admission charges and against double-billing did not arise out of the voluntary act of the copyright owner employing these devices to realize a more ample reward from his copyright. Although the restrictions were embodied in, they did not emerge from, a contract between the party initiating the restrictions and the party accepting them. They did not eventuate from negotiation and a meeting of minds between the owner of the copyright on the picture and the licensee-exhibitor upon whom the restrictions operated. Thus, the restrictions stem from neither of the two sources from which alone they could

claim the sanction of the law. On the contrary, they give effect to the will, the interest, the demand of the first-run exhibitor whose interest in the copyright was confined to his privilege of first exhibition and whose concern with subsequent exhibitions was to create for himself, at the expense of his weaker rivals, a competitive advantage. If the restraints had represented merely an effort to exploit the advantages of copyright to the full, Interstate would have had no part in creating the edifice of restriction.

Appellants assert (Br., p. 33) that the copyright owner may, by restrictive covenant, protect the granted right of exhibition. The principal authority which they cite, *Manners* v. *Morosco*, 252 U. S. 317, was not a suit for infringement and involved the construction of a contract, not any question as to the extent of the privileges derived from copyright law. The case held that a contract giving exclusive rights to the stage production of a play, without mention of motion-picture exhibition rights, contained an implied reservation of these rights by the copyright owner and also an implied covenant on his part not to destroy the value of the granted right of stage production by permitting contemporaneous motion-picture production of the play. The decision, apart from the fact that it concerned contract rights in the general domain of the law, dealt with a totally different situation from that presented here. The clearance provisions of

Interstate's contracts gave it the very protection against simultaneous exhibition to which the Court gave recognition in the *Manners* case; the restrictions here involved only became effective 45 days or more after Intertsate's right of first-run exhibition had expired (*supra*, p. 59).

Appellants also cite (Br., p. 35) the holding in *Bement* v. *National Harrow Co.*, 186 U. S. 70, that the Sherman Act is not violated when a patent owner, in licensing another to manufacture and sell certain patented articles, agrees not to license any other person to manufacture and sell the same patented articles . Appellants seem to rely upon the fact that the Court said (p. 94) that this was "a proper provision for the protection of the individual who is the licensee." All that this statement means is stated by the Court itself in the same sentence, namely, that such a provision "is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article."

Appellants contend (Br., p. 38) that because a distributor could give Interstate an exclusive license, it can exercise the lesser right of agreeing with Interstate as to what use the distributor shall make of his copyright after the privilege of exhibition given Interstate has expired. A similar argument was advanced in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, *supra*, namely, that because a patentee may withhold his

patent altogether from public use he must logically by permitted to impose any conditions which he chooses upon any use which he may allow of it. This Court rejected the contention, saying (p. 514):

> The defect in this thinking springs * * * from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law.

See also the similar reasoning in the *Carbice* case, *supra,* p. 31.

To give an exclusive license is a primary exercise of the right to exclude conferred by patent and copyright law. To attach conditions and limitations upon licensees, by reason of agreement between the patent or copyright owner and a third person, even though that person be a prior licensee, is "a horse of a different color."

Appellants seem to contend that the distributors' agreements with Interstate tend to protect the revenue received by Interstate from first-run exhibition and that agreement to protect the revenue of the first-run licensee by imposing the admission-price and double-billing restrictions on subsequent-run exhibitors was therefore a proper exercise of a privilege conferred by copyright law. But, leav-

ing other considerations aside, a short answer is that the restrictions provided for in the agreements with Interstate were not reasonably confined to protection of Interstate's revenue from first-run exhibition—the restrictions chiefly affected subsequent-run exhibitors who were not substantially competitive with Interstate's first-run theatres (*supra,* p. 72).

Possibly appellants will also contend that the agreements with Interstate tended to increase the total license fees received by the distributors from exhibition licenses and that the restrictions provided for in these agreements therefore served to increase the copyright owner's reward from exercise of his exclusive right of exhibition. One answer is that already given, that the means adopted to increase the copyright owner's reward, i. e., agreement with the first licensee to impose restrictions upon subsequent licensees, is not within any copyright privilege (*supra,* pp. 87–89). A second answer is that the agreements would not tend to increase the distributor's total license fees derived from exhibition licenses if total license fees are measured, not solely by those paid by exhibitors in Interstate cities where the restrictions were imposed, but by those paid by exhibitors throughout the State of Texas (*supra,* p. 46). The latter is the true measure of the reward derived by the distributor from exercise of his right to license exhibition of copyrighted pictures.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

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DECEMBER 1938.

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U. S. GOVERNMENT PRINTING OFFICE: 1939

P. 11,
P. 7 of dissent-

SUPREME COURT OF THE UNITED STATES.

Nos. 269, 270.—October Term, 1938.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., Appellants,
269 *vs.*
The United States of America.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants,
270 *vs.*
The United States of America.

Appeals from the District Court of the United States for the Northern District of Texas.

[February 13, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345, from a final decree of the District Court for northern Texas restraining appellants from continuing in a combination and conspiracy condemned by the court as a violation of § 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. § 1, and from enforcing or renewing certain contracts found by the court to have been entered into in pursuance of the conspiracy. 20 F. Supp. 868. Upon a previous appeal this Court set aside the decree and remanded the cause to the District Court for further proceedings because of its failure to state findings of fact and conclusions of law as required by Equity Rule 70½. 304 U. S. 55. The case is now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce.

Appellants comprise the two groups of defendants in the District Court. The members of one group of eight corporations which are distributors of motion picture films, and the Texas agents of two of them, are appellants in No. 270. The other group, corporations and

individuals engaged in exhibiting motion pictures in Texas and some of them in New Mexico, appeals in No. 269. The distributor appellants are engaged in the business of distributing in interstate commerce motion picture films, copyrights on which they own or control, for exhibition in theatres throughout the United States. They distribute about 75 per cent. of all first-class feature films exhibited in the United States. They solicit from motion picture theatre owners and managers in Texas and other states applications for licenses to exhibit films, and forward the applications, when received from such exhibitors, to their respective New York offices where they are accepted or rejected. If the applications are accepted, the distributors ship the films from points outside the state of exhibition to their exchanges within those states, from which, pursuant to the license agreements, the films are delivered to the local theatres for exhibition. After exhibition the films are reshipped to the distributors at points outside the state.

The exhibitor group of appellants consists of Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., and Hoblitzelle and O'Donnell, who are respectively president and general manager of both and in active charge of their business operations. The two corporations are affiliated with each other and with Paramount Pictures Distributing Co., Inc., one of the distributor appellants.

Interstate operates forty-three first-run and second-run motion picture theatres, located in six Texas cities.[1] It has a complete monopoly of first-run theatres in these cities, except for one in Houston operated by one distributor's Texas agent. In most of these theatres the admission price for adults for the better seats at night is 40 cents or more. Interstate also operates several subsequent-run theatres in each of these cities, twenty-two in all, but in all but Galveston there are other subsequent-run theatres which compete with both its first- and subsequent-run theatres in those cities.

Texas Consolidated operates sixty-six theatres, some first- and some subsequent-run houses, in various cities and towns in the Rio Grande Valley and elsewhere in Texas and in New Mexico. In some of these cities there are no competing theatres, and in six leading cities there are no competing first-run theatres. It has 20 theatres in the six Texas cities in which Interstate operates. The

[1] A first-run theatre is one in which a picture is first exhibited in any given locality. A subsequent-run theatre is one in which there is a subsequent exhibition of the same picture in the same locality.

Interstate and Texas Consolidated dominate the motion picture business in the cities where their theatres are located is indicated by the fact that at the time of the contracts in question Interstate and Consolidated each contributed more than 74 per cent. of all the license fees paid by the motion picture theatres in their respective territories to the distributor appellants.[2]

On July 11, 1934, following a previous communication on the subject to the eight branch managers of the distributor appellants, O'Donnell, the manager of Interstate and Consolidated, sent to each of them a letter[3] on the letterhead of Interstate, each letter

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[2] Payments of license fees by Interstate to distributor appellants in the 1934-35 season aggregated $1,077,819.58. Payments by all other exhibitors operating theatres in the same cities aggregated $369,594.72. Texas Consolidated payments for the same period aggregated $594,863.68 All other exhibitors operating in the same cities paid $47,928.22.

[3]

"INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas.

July 11, 1934.

Messrs.: J. B. Dugger, Herbert MacIntyre, Sol Sachs, C. E. Hilgers, Leroy Nickel, J. B. Underwood, E. S. Olsmyth, Doak Roberts.

Gentlemen:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase produce to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

Sincerely,

(Signed) R. J. O'DONNELL."

naming all of them as addressees, in which he asked compliance
two demands as a condition of Interstate's continued exhibitio
the distributors' films in its 'A' or first-run theatres at a night
mission of 40 cents or more.[4] One demand was that the distribu
"agree that in selling their product to subsequent runs, that
'A' product will never be exhibited at any time or in any th
at a smaller admission price than 25¢ for adults in the evenin
The other was that "on 'A' pictures which are exhibited at a n
admission of 40¢ or more—they shall never be exhibited in
junction with another feature picture under the so-called p
of double features". The letter added that with respect to
"Rio Grande Valley situation", with which Consolidated alone
concerned, "We must insist that all pictures exhibited in our
theatres at a maximum night admission price of 35¢ must als
restricted to subsequent runs in the Valley at 25¢".

The admission price customarily charged for preferred seat
night in independently operated subsequent-run theatres in Tex
the time of these letters was less than 25 cents. In seventeen of
eighteen independent theatres of this kind whose operations
described by witnesses the admission price was less than 25 c
In one only was it 25 cents. In most of them the admission wa
cents or less. It was also the general practice in those theatre
provide double bills either on certain days of the week or with
feature picture which was weak in drawing power. The distrib
appellants had generally provided in their license contracts f
minimum admission price of 10 or 15 cents, and three of them
included provisions restricting double-billing. But none was at
time previously subject to contractual compulsion to continue
restrictions. The trial court found that the proposed restrict
constituted an important departure from prior practice.

The local representatives of the distributors, having no autho
to enter into the proposed agreements, communicated the
posal to their home offices. Conferences followed between Ho
zelle and O'Donnell, acting for Interstate and Consolidated, and
representatives of the various distributors. In these confere
each distributor was represented by its local branch manager

[4] A Class 'A' picture is a "feature picture" having five reels or mo
film each approximately 1,000 feet in length, shown in theatres of the spe
Texas cities charging 40 cents or more for adult admission at night. App
mately fifty per cent. of the pictures released by the distributor defendan
the Texas cities in 1934-1935 were Class 'A' pictures.

by one or more superior officials from outside the state of Texas. In the course of them each distributor agreed with Interstate for the 1934-35 season to impose both the demanded restrictions upon their subsequent-run licensees in the six Texas cities served by Interstate, except Austin and Galveston. While only two of the distributors incorporated the agreement to impose the restrictions in their license contracts with Interstate, the evidence establishes, and it is not denied, that all joined in the agreement, four of them after some delay in negotiating terms other than the restrictions and not now material. These agreements for the restrictions—with the immaterial exceptions noted[5]—were carried into effect by each of the distributors' imposing them on their subsequent-run licensees in the four Texas cities during the 1934-35 season. One agreement, that of Metro-Goldwyn-Mayer Distributing Corporation, was for three years. The others were renewed in the two following seasons and all were in force when the present suit was begun.

None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose the restrictions in certain other Texas and New Mexico cities.

The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Forth Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon "low-income members of the community" patronizing the theatres of these exhibitors was to withhold from them altogether the "best

[5] The Metro-Goldwyn-Mayer Distributing Corporation agreement with Interstate did not include Houston, where it operated through a subsidiary a first run theatre, and where it did not until the 1936-1937 season license any subsequent run pictures. It agreed with Interstate to impose the restrictions in Houston for the 1936-1937 season.

entertainment furnished by the motion picture industry;" and th
the restrictions operated to increase the income of the distribu
and of Interstate and to deflect attendance from later-run exhi
ors who yielded to the restrictions to the first-run theatres of
terstate.

The court concluded as matters of law that the agreement of
distributors with each other and those with Interstate to imp
the restrictions upon subsequent-run exhibitors and the carry
of the agreements into effect, with the aid and participation
Hoblitzelle and O'Donnell, constituted a combination and cons
acy in restraint of interstate commerce in violation of the Sher
Act. It also concluded that each separate agreement between
terstate and a distributor that Interstate should subject itself
the restrictions in its subsequent-run theatres and that the
tributors should impose the restrictions on all subsequent-r
theatres in the Texas cities as a condition of supplying them w
its feature pictures, was likewise a violation of the Act.

It accordingly enjoined the conspiracy and restrained the
tributors from enforcing the restrictions in their license ag
ments with subsequent-run exhibitors[6] and from enforcing the
tracts or any of them. This included both the contracts of In
state with the distributors and the contract between Consolida
and Paramount, whereby the latter agreed to impose the restrict
upon subsequent-run theatres in Texas and New Mexico ser
by it.

Appellants assail the decree of the District Court upon th
principal grounds: (a) that the finding of agreement and cons
acy among the distributor appellants to impose the restrict
upon later-run exhibitors is not supported by the court's
sidiary findings or by the evidence; (b) that the several separ
contracts entered into by Interstate with the distributors are wit
the protection of the Copyright Act and consequently are not
lations of the Sherman Act; and (c) that the restrictions do
unreasonably restrain interstate commerce within the provisions
the Sherman Act.

The Agreement Among the Distributors.

Although the films were copyrighted, appellants do not d
that the conspiracy charge is established if the distribu

[6] The injunction against the double feature restriction excepted from
operation two distributors, and the agent of one of them, which had previo
made a practice of including such a restriction in their license agreement

agreed among themselves to impose the restrictions upon subsequent-run exhibitors. *Straus* v. *American Publishers' Association*, 231 U. S. 222; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30. As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged by appellants because not supported by subsidiary findings or by the evidence. We think the inference of the trial court was rightly drawn from the evidence. In the view we take of the legal effect of the cooperative action of the distributor appellants in carrying into effect the restrictions imposed upon subsequent-run theatres in the four Texas cities and of the legal effect of the separate agreements for the imposition of those restrictions entered into between Interstate and each of the distributors, it is unnecessary to discuss in great detail the evidence concerning this aspect of the case.

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

There was risk, too, that without agreement diversity of would follow. Compliance with the proposals involved a radi parture from the previous business practices of the industry drastic increase in admission prices of most of the subseque theatres. Acceptance of the proposals was discouraged by a three of the distributors' local managers. Independent exh met and organized a futile protest which they presented to t resentatives of Interstate and Consolidated. While as a result dependent negotiations either of the two restrictions witho other could have been put into effect by any one or more of t tributors and in any one or more of the Texas cities served terstate, the negotiations which ensued and which in fact did in modifications of the proposals resulted in substantially mous action of the distributors, both as to the terms of the r tions and in the selection of the four cities where they w operate.

One distributor, it is true, did not agree to impose the r tions in Houston, but this was evidently because it did not licenses to any subsequent-run exhibitor in that city, where it affiliate operated a first-run theatre.[7] The proposal was mously rejected as to Galveston and Austin, as was the reques the restrictions should be extended to the cities of the Rio G Valley served by Consolidated. We may infer that Galvesto omitted because in that city there were no subsequent-run th in competition with Interstate. But we are unable to find record any persuasive explanation, other than agreed conce action, of the singular unanimity of action on the part of th tributors by which the proposals were carried into effect as w in four Texas cities but not in a fifth or in the Rio Grande V Numerous variations in the form of the provisions in the di utors' license agreements and the fact that in later years t them extended the restrictions into all six cities, do not w the significance or force of the nature of the response to the posals made by all the distributor appellants. It taxes cred to believe that the several distributors would, in the circumst have accepted and put into operation with substantial unani such far-reaching changes in their business methods without understanding that all were to join, and we reject as beyon range of probability that it was the result of mere chance.

[7] See footnote 5.

Appellants present an elaborate argument, based on the minutiae of the evidence, that other inferences are to be drawn which explain, at least in some respects, the unanimity of action both in accepting the restrictions for some territories and rejecting them for others. It is said that the rejection of Consolidated's proposal for the Rio Grande Valley may have been due to the fact that the demand with respect to that territory differed materially from that directed to the six Texas cities. It is urged that the proposal for the Valley was that all pictures once shown in a first-run theatre with a 35 cents admission should not thereafter be exhibited in any city in the Valley for less than 25 cents admission, while the demand in behalf of Interstate with respect to the six Texas cities was that 'A' pictures, after a first-run in theatres charging 40 cents admission or more, should not thereafter be exhibited in the same city for less than 25 cents admission. But reference to the O'Donnell letter shows that both demands related to pictures shown in a first-run or 'A' theatre and were not in terms limited to subsequent-run exhibitions in the same city in which the first run had occurred. The record discloses no reason for the distinction taken between first-run theatres in the six cities charging an admission of 40 cents or more and those in the Valley served by Consolidated charging 35 cents, other than the fact that the cities there were smaller.

The trial court, interpreting the letter in the light of the whole evidence, which showed unmistakably that one purpose of both demands was to protect first-run houses from competition of subsequent-run houses, concluded that the substance of the proposals in one case as in the other was that the restrictions upon the subsequent-run theatres were to be imposed only in the same city in which the first run had occurred. We agree with its conclusion, but in any event since the demand made by Interstate was phrased as broadly as that made by Texas Consolidated, both as to the kind of pictures affected and the scope of the restriction, we can find no basis for saying that one was more limited in its essentials than the other, or that any explanation is thus afforded of the unanimous acceptance of the demands of Interstate in four of the six cities affected by the proposal, and the unanimous rejection of the demand of Consolidated. In the face of this action and similar unanimity with respect to other features of the proposals, and the strong motive for such unanimity of action, we decline to speculate whether there may have been other and more legitimate reasons for such

action not disclosed by the record, but which, if they existed, were known to appellants.

The failure of the distributors to make any substantial changes in their business practices in dealing with exhibitors in Austin for the season 1934-35; their failure to unite in imposing the restriction as to admission prices in subsequent-run theatres in that city; and their failure to enter into the proposed restrictive agreement with Interstate for Austin, are likewise unexplained by any inferences to be drawn from the record. The facts that three of the distributors continued their established practice there, as elsewhere, of placing restrictions against double-billing in their license contracts; that the 25 cents admission restriction appeared in the Austin license agreements of one distributor for that year; and that certain of the distributors included the restrictions in their Austin license agreements in later years, do not militate against this conclusion. Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions upon their licensees in the four Texas cities.

This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton* v. *United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character.

Runkle v. *Burnham*, 153 U. S. 216, 225; *Kirby* v. *Talmadge*, 160 U. S. 379, 383; *Bilokumsky* v. *Tod*, 263 U. S. 149, 153, 154; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 111, 112; *Mammoth Oil Company* v. *United States*, 275 U. S. 13, 52; *Local 167* v. *United States*, 291 U. S. 293, 298.

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck* v. *United States*, 253 Fed. 212, 213, aff'd, 249 U. S. 47; *Levey* v. *United States*, 92 F. (2d) 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Association* v. *United States*, 234 U. S. 600; *Lawlor* v. *Loewe*, 235 U. S. 522, 534; *American Column Co.* v. *United States*, 257 U. S. 377; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371.

The Protection Afforded by the Copyright Act to the Contracts between Interstate and the Distributors.

The decree below enjoined enforcement and renewal of the separate agreements between each distributor and Interstate and of the contract between Paramount and Consolidated imposing the restrictions upon later-run theatres in certain cities in Texas and New Mexico, although the court found no conspiracy among the distrib-

utors to effect this latter restriction. Appellants assail this of the decree on the ground that such separate agreements, tered into without agreement or concert among the distributor a legitimate exercise of the monopoly secured to the distri by their copyrights.

Under § 1 of the Copyright Act, 35 Stat. 1075, 17 U. S. C the owners of the copyright of a motion picture film acqui right to exhibit the picture and to grant an exclusive or restr license to others to exhibit it. See *Manners* v. *Morosco*, 252 317. Appellants argue that the distributors were free to l the films for exhibition subject to the restrictions, just as a pa in a license to manufacture and sell the patented article m the price at which the licensee may sell it. *Bement* v. *Na Harrow Co.*, 186 U. S. 70; *United States* v. *General Electri* 272 U. S. 476. That the parallel is not complete is obvious, cause a patentee has power to control the price at which his li may sell the patented article, it does not follow that the owne copyright can dictate that other pictures may not be shown the licensed film or the admission price which shall be paid f entertainment which includes features other than the parti picture licensed. Cf. *Motion Picture Patents Co.* v. *Universal Manufacturing Co.*, 243 U. S. 502; *Carbice Corporation* v. *Ame Patent Development Corporation*, 283 U. S. 27; *Leitch Manufa ing Co.* v. *Barber Co.*, 302 U. S. 458.

We have no occasion now to pass upon these or related tions. Granted that each distributor, in the protection of his copyright monopoly, was free to impose the present restrictions his licensees, we are nevertheless of the opinion that they wer free to use their copyrights as implements for restraining comm in order to protect Interstate's motion picture theatre monopo suppressing competition with it. The restrictions imposed Interstate's competitors did not have their origin in the volu act of the distributors or any of them. They gave effect t will and were subject to the control of Interstate, not by v of any copyright of Interstate, for it had none, but throug contract with each distributor. Interstate was able to acquir control and impose its will by force of its monopoly of firs theatres in the principal cities of Texas and the threat to use it nopoly position against copyright owners who did not yield demands. The purpose and ultimate effect of each of its cont with the distributors was to restrain its competitors in the th

business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.

The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season, competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of its terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals.

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between

two copyright owners or patentees. *Straus* v. *American Publi ers' Association, supra; Paramount Famous Lasky Corp.* v. *Uni States, supra;* see *Standard Oil Co.* v. *United States,* 283 U. S. 1 174. In either case if the contract is effective, as it was here, e petition is suppressed and the possibility of its resumption p cluded by force of the contract. An agreement illegal becaus suppresses competition is not any less so because the competi article is copyrighted. The fact that the restraint is made ea or more effective by making the copyright subservient to the c tract does not relieve it of illegality. *Standard Sanitary Mfg.* v. *United States,* 226 U. S. 20.

Unreasonableness of the Restraint.

The restrictions imposed on the subsequent-run exhibitors w harsh and arbitrary. As we have seen, they were forced upon distributors and upon their customers as a result of the ag ments entered into by Interstate with the distributors. C pliance with the restrictions was a uniform condition of exh tion of the films by subsequent-run theatres. There were w differences in the location and character of the subsequent-r houses in the four Texas cities, which afforded basis for the co sponding differences in admission prices charged before the strictions were adopted. Due to the practice of the distributors establishing clearance periods between the first and each suc sive run, later runs are progressively less attractive. The poo class of theatres, exhibiting the later runs, sometimes offered double bill as an offsetting inducement for patronage. Desp these differences which normally affect the admission price t could be charged by subsequent-run theatres, the 25 cents admiss price was to be required of all alike, forcing increases in admiss price ranging from 25 per cent. to 150 per cent.

The trial court found that practically all of the later-run hibitors who bowed to the restrictions would not have done so for the compulsion of their need of showing the restricted pictu and that the result was to increase the income of the distribut and Interstate and diminish that of the exhibitors who accep the restrictions, by deflecting attendance from subsequent-r theatres to Interstate's first-run theatres. There was no testim that such loss was offset by the higher admission price of the seco run theatres, and there was evidence that some of the poorer c of second run-theatres suffered loss of income by yielding to

restrictions. Some who did not yield were compelled to forego exhibition of the distributors' feature pictures. The effect was a drastic suppression of competition and an oppressive price maintenance, of benefit to Interstate and the distributors but injurious also to Interstate's subsequent-run competitors and to the public. The benefit, at such a cost does not justify the restraint. *Eastern States Lumber Association* v. *United States, supra*, 613; *Duplex Co.* v. *Deering*, 254 U. S. 443, 468; *Anderson* v. *Shipowners Association*, 272 U. S. 359, 363; *Bedford* v. *Stone Cutters' Association*, 274 U. S. 37, 47. It does not appear that the competition at which they were aimed was unfair or abnormal. Cf. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 363, 372. The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85. Cf. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397, *et seq.*

We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 269, 270.—October Term, 1938.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., Appellants,
vs.
The United States of America.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants,
vs.
The United States of America.

On Appeal from the United States District Court for the Northern District of Texas.

[February 13, 1939.]

Mr. Justice Roberts.

I think the decree should be reversed. The bill charges that the two exhibitor defendants which were under the same management, knowing that subsequent run houses in Dallas, Houston, San Antonio, Forth Worth, Austin, and Galveston, the largest cities in Texas, and in Waco, Wichita Falls, Tyler, Amarillo, Texas, and Albuquerque, New Mexico, could not operate without the showing of feature films, in order to strengthen these two defendants' monopoly in first run exhibition of such feature films, and to monopolize the business of exhibiting feature films in second or subsequent run houses operated by them in those cities, conspired to notify the distributor defendants that, during the 1934-1935 season, and subsequent seasons, the latter must advise second and subsequent run exhibitors that such feature films could not be operated in second or subsequent run houses for less than twenty-five cents adult lower floor admission or as part of a double feature program and that, unless the distributor defendants would do so, the exhibitors would not maintain a night adult admission price of forty cents or more for the first run exhibitions of feature films licensed by the distributor defendants to them. The bill charged that, upon

receipt of advices to this effect from the exhibitor defendants, distributor defendants joined in the unlawful combination and c spired with the exhibitor defendants to place such restrictions licenses to second or subsequent run exhibitors.

The parties entered into a stipulation of facts, in lieu of e dence, binding upon them for the purposes of suit, and furt agreed that any party might introduce additional relevant and m terial evidence bearing upon the issues "but not inconsistent w any fact contained in" the stipulation. Plaintiff and defenda introduced additional evidence. The testimony of second or su quent exhibitors called as witnesses by plaintiff and defendants m be said to have been, in some respects, conflicting. The evide offered by the plaintiff and the defendants with respect to the n tiations between the exhibitor defendants and the distributor fendants, and the conduct of the latter, was uncontradicted u all points material to a resolution of the fact issues in the cau

The District Court made ten findings (numbered from 12 to inclusive) of subsidiary or evidentiary facts and based upon th specific findings one conclusion of ultimate fact,—that the dist utor defendants conspired amongst themselves to take uniform tion upon the proposals of Interstate and conspired with each o and with Interstate to impose the restrictions requested by In state upon all subsequent run exhibitors in Dallas, Fort Wo Houston, and San Antonio.

The appellants contend, and I think their contention is sou that the subsidiary findings are insufficient to support the fact clusion and that these subsidiary findings are, in a number of v instances, contrary to, or unsupported by, the agreed statement facts and, in other instances, are in the teeth of uncontradi and unimpeached testimony.

Since this is a direct appeal from the District Court in an eq suit, and the findings are challenged, this court is bound to rev them and to determine whether they have a proper basis in the dence. I think such a review demonstrates the lack of suppor the critical basic findings. No good purpose would be served detailed analysis of what I consider erroneous and unsuppo findings. But I am of opinion that the findings ought not to st and that the conclusion that there was a conspiracy, either betw the distributor defendants or between them and the Interstate poration, is unjustified. The opinion of this court accepts

osely follows these findings of fact but, while approving the con-
usion of the District Court, finds it unnecessary to give detailed
onsideration to the appellants' challenge of the accuracy and suf-
iciency of the subsidiary findings, for the reason that it holds, as
matter of law, on uncontradicted facts, that there were eight sep-
rate conspiracies unreasonably to restrain trade in interstate com-
merce in virtue of the agreement of each of the distributor de-
fendants with Interstate to impose restrictions on subsequent run
exhibitors in certain cities.

Separately considered, I think these agreements are not con-
spiracies contemplated by the Sherman Act and the holding that
they are goes far beyond anything this court has ever decided. The
distributor defendants are owners of copyrights on moving picture
films. The copyright law gives them the exclusive privilege of
licensing performances of the photoplays recorded. On the other
hand, there are competing concerns whose copyrighted feature films
are licensed for the purpose of production. In addition, there are
copyrighted films of lower classes well known to the trade. These
lower class films are usually licensed to houses that charge lower
prices for first run exhibition than those charged by theatres show-
ing feature films, and both the feature films, second and subsequent
run, and other films of less attraction and less expensively pro-
duced, are exhibited by so-called second run houses. The latter pay
a much reduced rate to obtain the feature films for exhibition in
the same city after their original showing as feature films in first
run houses. Many of the subsequent run houses charge low ad-
mission prices, and sometimes put on double bills.

Interstate is the largest licensee of first run feature films in
Texas. It has many more first run houses than any other Texas
exhibitor. Its first run houses are in the largest cities where the
highest admission prices can be obtained. The distributors are, of
course, interested in the conservation and protection of the neces-
sarily high license fees which they must obtain for first runs of
feature pictures. These are far higher than those received for the
second showings of the same pictures in the same city. They
naturally have to protect themselves and their licensees from the
destruction of the good will and drawing power of these feature
films in their first runs. In an effort to accomplish this, by requir-
ing minimum admission charges and prohibiting double billing in

subsequent runs of feature pictures, they may, of course, narr
the opportunity of second run houses to obtain feature pictures

I agree that while the Copyright Act gives a distributor a
called monopoly, that monopoly cannot be made the cover for
conspiracy to restrain trade or commerce.[1] But I think it
secures the issue to use the phrase "monopoly". What the co
right gives is much the same as what is conferred by the pat
law.[2] The exhibition of a photoplay, were it not for the copyri
law, would amount to a public disclosure and the use of the ma
rial would thereafter be open to the public. All the Copyright
does is to create a form of property in the literary or artistic p
duction of the author or artist. The Act attaches to the prod
of his brain certain attributes of property. One of these is
right of exclusive use similar to that attaching to physical proper
another is the right to sell the production with consequent exclu
enjoyment in the vendee; another is the right to license others
use the product as one might lease or bail real or personal prope
The monopoly, so called, amounts to no more than the attachm
to the work of an author or composer or producer of motion pictu
of the same rights as inhere in other property under the comm
law. Therefore, the standing of the distributor defendants tow
their customers, as respects the productions proposed to be licen
differs in no way from that of the owner of any other prope
toward those to whom he leases or licenses its use or sale.

The decision of the court necessarily means that the owner
product may not agree with an important customer that the for
will not sell the product at a cut rate to the latter's competitor
the same city in which he conducts his business. The decision l
to the necessary conclusion that a manufacturer whose skill res
in the production of apparatus of superior quality may not, in
sideration of a price to be paid him for the bailment of that
paratus to certain users in a city, contract, as an inducemen
the users, that he will not bail the same apparatus at lower
destructive prices to his bailees' competitors in the same city
think it has never been suggested that an agreement of the
mentioned, restricted in time and place, amounts to a conspirac
unreasonable restraint of trade or commerce. The right to

[1] Straus v. American Publishers' Assn., 231 U. S. 222; Paramount Fa
Corporation v. United States, 282 U. S. 30.

[2] See United States v. Dubilier Condenser Corp., 289 U. S. 178, 186.

such agreements is essential to the realization of the full value of the property. It is conceded that the distributor defendants might grant exclusive licenses to Interstate, and that an exclusive license to Interstate would not constitute a conspiracy under the Sherman Act, or confer any cause of action on others who desired licenses in the same city; and this remains true however much such action by the licensor might injure the business of others seeking licenses.

I am of opinion that the restrictions in the licenses of second run exhibitors were not unreasonable restraints of commerce under the Sherman Act. There is no contention that the action of the distributor defendants discouraged competition between them either for the business of Interstate or for that of subsequent run licensees. The restrictions upon the latter were not intended to increase license fees paid by them or those paid by Interstate; they were imposed to prevent destruction of the good will which made possible the continued exhibition of first run feature pictures and to avoid decrease of the revenue from those pictures then and theretofore enjoyed under licenses to Interstate and other first run feature exhibitors. The reasonableness of the restrictions must be judged by the situation of the industry and the propriety of its protection from practices which would seriously injure it.[3] The question always is whether an agreement unduly restrains competition and, in applying this test, consideration must be given both to the intent and effect of the agreement in the light of realities.

It is settled that the proprietor of a copyright may grant an exclusive license; that is, may covenant with his licensee that he will not license anyone else, as the owner of a patent may grant a similar exclusive license to make or sell the patented article.[4] It is settled that the distributor defendants could lawfully stipulate with their licensees, whether first run or subsequent run, as to the admission price to be paid by patrons and that, so to do, would not be a violation of the Sherman Act.[5] But it is said that if, in order to protect its earnings from first run licenses by enabling its licensees to pay the demanded consideration, the distributor agrees

[3] Appalachian Coals, Inc. v. United States, 288 U. S. 344, 358, 359, 360, 362. Compare Chicago Board of Trade v. United States, 246 U. S. 231, 238.

[4] Manners v. Morosco, 252 U. S. 317; Bement v. National Harrow Co., 186 U. S. 70.

[5] United States v. General Electric Co., 272 U. S. 476, 488-490; Standard Oil Co. v. United States, 283 U. S. 163, 179.

to restrict in anywise the exhibition of the same feature by a su
sequent run exhibitor he has violated the Anti-Trust Law. In t
nature of things this cannot be true. The record discloses th
the distributors have always provided a so-called "clearance" b
tween the first run and subsequent runs of feature pictures. B
this is meant that the distributors refuse to license a subseque
run theatre to show such a feature until the expiration of a giv
number of days or months after the picture has been shown
a first run house. This is a perfectly natural procedure and o
obviously required to protect the value of the first run licen
Under the decision here, however, if a distributor should agree wi
a first run house that if it will contract for a given feature pictu
at a given price the distributor will impose a clearance on seco
run houses this would be a conspiracy in restraint of trade. Oth
restrictions tending to preserve the value of the first exhibition
a feature picture such as those challenged in this case are just
necessary and I suppose, in the absence of agreement would
held just as lawful as the restriction known as a clearance.

The opinion of the court recognizes that a distributor may la
fully agree that its exhibitor licensee shall have the exclusive ri
to exhibit a copyrighted play but condemns the agreements here
controversy although a much less drastic restraint respecti
licenses to subsequent run exhibitors results from the provision
licenses with a restriction as to price and as to double billing.

Once the property rights conferred by the Copyright Law
recognized it must follow that the principles governing the right
use, sell, or turn to account other forms of property are equa
applicable here. We have often held that a contract containing
covenant in restraint of trade is valid if the restraint is reasona
necessary for the protection of the right granted by the owner
the property. Examples of such lawful contracts are those
which the vendor of a business sold as a going concern agrees t
for the protection of its value he will for a period of years refr
from engaging in the same business in a prescribed territory,[6] a
those by the vendor with the vendee of an article to be used
business or trade that it shall not be used so as to interfere w

[6] Cincinnati Packet Co. v. Bay, 200 U. S. 179; Oregon Steam Naviga
Co. v. Winsor, 20 Wall. 64, 67.

the vendor's business;[7] which are held not to offend the Sherman Act if the prohibition has a reasonable relation to the value of the business of the vendor.

The Government stresses the fact that each of the ~~exhibitors~~ distributors must have acted with knowledge that some or all of the others would grant or had granted Interstate's demand. But such knowledge was merely notice to each of them that if it was successfully to compete for the first run business in important Texas cities it must meet the terms of competing distributors or lose the business of Interstate. It could compete successfully only by granting exclusive licenses to Interstate and injuring subsequent run houses by refusing them licenses,—a course clearly lawful,—or by doing the less drastic thing of agreeing to protect the good will of its pictures by putting necessary and not severely burdensome restrictions upon subsequent run exhibitors, which I think equally lawful.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER join in this opinion.

[7] Fowle v. Park, 131 U. S. 88; Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 252; Moore v. New York Cotton Exchange, 270 U. S. 593; United States v. General Electric Co., 272 U. S. 476; United States v. Addyston Steel Co., 85 Fed. 271.